No. 1163

LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
MAR 15 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

---

FRANK SMITH,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

---

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Robert Everett L. Looney
Attorney for Frank Smith
5405 Schumacher
Houston, Texas
Ph. 621-5761

INDEX

CASES: Pages


Alford v. United States, 51 S. Ct. 218; 75 L. Ed. 629 (1931) ..... 25, 150
Apel v. United States, 247 F2d 277, 283. 161
Apex Distributing Co., U. S. v. 148 F. Supp. 365 ..... 168
Bain, Ex Parte, 121 U. S. 1 ..... 3, 5, 7 108, 109, 111, 118
Balodimas, U. S. v. 177 F. 2d 485 ....8, 10, 122
Barton v. U. S., 263 F2d 894 ..... 21, 135
Beadon, U. S., v. 49 F2d 164, cert. den. 284 U. S. 625 ..... 10, 123
Belvin v. U. S., 273 F2d 583, 5 Cir. ... 135
Benedec, et al. v. U. S., 375 U.S. 836 . 48
Brooks, People v. 166 N.E. 35, 334 Ill. 549 ..... 52
Browder, State v. 183 S. C. 447 ..... 52
Brown v. U. S., 222 F2d 293, 9 Cir. .... 22
Burton v. Commonwealth, 122 Va. 847 .... 52
Butler v. U. S., 317 F2d 249, 8 Cir.,1963 47
Caroll v. U. S., 16 F2d 951, cert. den. 273 U.S. 763 (2 Cir.) ..... 79
Carrado v. U. S., 210 F2d 712 (D. C. Cir.) 22
Casserino, U. S. v. 89 F. Supp. 288 (E.D.N.Y., 1960) ..... 168
Cohen v. U. S., 363 F2d 321, 327 (5 Cir.) 51
Cross v. U. S., 353 F2d 454 ..... 133
Cruikshank, U. S. v. 92 U. S. 542, 23 L.Ed. 588, 593 ..... 169
Dahly v. U. S., 8 Cir. 50 F2d 37 .....28, 49, 60
Dante, People v. 35 Ill. 2d 538 ..... 52
Davidson v. U. S., 61 F2d 250, 254-255 . 76
DeLuna v. U. S., 5 Cir., 308 F2d 140, reh. den. 324 F2d 375 ..... 21, 135, 143
Dickerson v. U. S., 18 F2d 887, 8 Cir. 77
Direct Sales Co. v. U. S., 319 U. S. 703, 711 (1943) ..... 61, 62, 63, 64, 66, 67
Dunn v. U. S., 307 F2d 883, C.A. Ga. 134

CASES (Continued) Pages

Echles, U. S. v. 352 F2d 892, 8 Cir. .. 135
Escalante v. U. S., 228 F2d 61 ..... 27
Everitt v. U. S., 5 Cir., 353 F2d 532 . 30, 166
Falcone, U. S. v. 311 U.S. 205.... 61, 63, 64
65, 66, 67
Frankfort Distilleries v. U. S.,
144 F2d 824, rev. 65 S.Ct. 661,
324 U. S. 293, 89 L. Ed. 951 .... 169
Glasser v. U. S., 315 U. S. 60 .. 27, 79, 80,88
Goddard v. U. S., 131 F2d 220, 5 Cir. 23
Grow, U. S. v. 394 F2d 182, 4 Cir. 62, 67
Haakinson v. U. S., 8 Cir., 238 F2d 775
Harnung v. Dist. of Columbia, 254 U. S.
135, 41 S. Ct. 53, 65 L. Ed. 185 28, 29,157
Hawkins v. U. S., 5 Cir., 324 F2d 873 . 30, 165
Hayes v. U. S., 329 F2d 209, 8 Cir.,
cert. den. 377 U. S. 980 ..... 20, 143
Hewitt v. U. S., 8 Cir., 110 F2d 1 29, 157
Holland v. U. S., 348 U. S. 121 ..... 50
Holmgren v. U. S., 271 U. S. 509.. 10, 123, 124
Ingram v. U. S., 360 U. S. 672, 79 S. Ct.
1314, 1320 (1959) ..... 61, 67
Jones v. U. S., 262 F2d 44 ..... 27
Kroeger Grocery and Baking Co. v. U. S.,
65 S. Ct. 188, 323 U. S. 777, 89 L.
Ed. 621 ..... 169
La Conte v. U. S., 330 F2d 700, 701,
1964 (10 Cir.) ..... 51, 61
Langford v. U. S., 178 F2d 48 ..... 16, 133
LaPage v. U. S., 146 F2d 536, 8 Cir. ..115, 118
Linde v. U. S., 13 F2d 59 (8 Cir.) .... 76
Loftus v. U. S., 46 F2d 841 ..... 77
Lyles v. U. S., 272 F2d 910, 5 Cir.,
cert. den. 356 U. S. 931 ..... 30
Manfredonia v. U. S., 374 U. S. 1020 .. 22
Metz and Kenneth Eugene Miller, U.S. v.
312 F2d 199, 6 Cir., 19-63 ..... 49
Middlebrook v. State, 56 S.W. 2d 872,
122 Tex. Cr. 559 ..... 52

CASES (Continued) Pages

N.L.R.B. v. Columbian Co., 306 U.S. 292 (1930) ..... 80
New York Life Ins. Co. v. McNelly, 79 Pac. 2d 948 (1938) ..... 73
Nye & Nissen v. U. S., 168 F2d 846, 854 (9 Cir., 1948) ..... 79
Oertle v. U.S. (9 Cir.), 370 F2d 719 .. 19
Ross, U.S. v. 92 U.S. 281, 283-284 (1875) 61,74
Richards v. U. S., 192 F2d 602 (D. C. Cir., cert. den., 342 U. S. 946 .... 23
Roach, U. S. v. 321 F2d 1 ..... 3, 5, 8, 112 117, 118
Safeway Stores v. U. S., 65 S. Ct. 121, 323 U. S. 768, 89 A. Ed. 615 ..... 169
Schaffer v. U. S., 221 F2d 17 (5 Cir.) 21, 135
Schmeller v. U. S., 6 Cir., 143 F2d 544 26, 152
Schneiderman, U. S. v. 106 F. Supp. 906, D. C. Cal. ..... 134
Schwartz, U. S. v. 325 F2d 355, C.A. Pa. 134
Smith v. U. S., 349 U. S. 932 ..... 22
Solomon, U. S. v. 26 R.F.D. 397 ..... 168
Sprengle, U. S. v. C.C.A. Pa., 103 F2d 876 ..... 16, 133
Stewart v. U. S., 318 U. S. 236 ..... 16
Stewart v. U. S., 366 U. S. 1 ..... 134
Stirone v. U. S., 361 U. S. 212 .. 3, 5, 7, 109 112, 117, 118
Stoneking v. U. S., 232 F2d 385 ..... 29, 155
Sykes v. U. S., 204 F. 909 (8 Cir.) ..... 28
Taliaferro v. U. S., 47 F2d 699 (9 Cir.) . 16
Tannuzzo, U. S. v. 174 F2d 177 (2 Cir.). 22
Tri-Angle Club, Inc. v. U. S., 265 F2d 829, 8th Cir., 1959 ..... 51
Yamin, People v. Sup. Ct. N. Y. 1965, 257 N. Y. S. 2d 11 ..... 165
Walker v. U. S., 254 F2d 509 ..... 27
White, People v. 333 Ill. 512 ..... 52
Williams v. Butterfield, 145 F. Supp. 567, affirmed 250 F2d 127, reh. den. 253 F2d 709 ..... 27

CASES (Continued) Pages

Williams v. U. S., 168 U. S. 382 ..... 16
Williamson v. U. S., 272 F2d 495, Cir. 5, cert. den. 362 U. S. 920 ..... 25, 150
Wong Sun and James Wah Toy v. U. S., 370 U. S. 908 ..... 49
Viereck v. U. S., 318 U. S. 236 ..... 16, 133

CONSTITUTION

Constitution of the United States, Amendments V and VI ..... 19, 33
Constitution of the U. S., Amendments 5, 14 169

RULES

Supreme Court Rule 19, Par. 1(b) ..... 2
Fed. Rules Criminal Procedure, Rule 14, USCA 135
Fed. Rules Criminal Procedure, Rule 7(f), USCA 169

STATUTES

18, U.S.C., Sec. 2 ..... 6, 115, 116
18, U.S.C., Sec. 371 ..... 3. 4. 35
18, U. S. C., Sec. 2312 ..... 6, 35, 115, 116
28 U. S. C., Sec. 1254(1) ..... 2

OTHER AUTHORITIES

23 C.J.S., Criminal Law, Sec. 920 ..... 46, 52
1 Wigmore on Evidence, 3rd Ed., Sec. 41 73

IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

FRANK SMITH,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

Petition For a Writ of Certiorari To The

United States Court of Appeals

For The Fifth Circuit

Petitioner, Frank Smith, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit as well as its order denying petitioner's motion for rehearing in this case.

OPINION BELOW

The opinion of the Court of Appeals has not been reported. A copy of the opinion is printed in Appendix A hereof, Ante. There was no opinion in the District Court.

The judgment and opinion of the Court of

Appeals sought to be reviewed, was dated and entered on November 27, 1968. A copy of the judgment is printed in Appendix B hereof, Ante.

Petitioner's Petition for Rehearing En Banc (timely filed on January 6, 1969, through extensions granted by the Court of Appeals) was denied on January 29, 1969. The per curium opinion and order denying said Petition For Rehearing, also sought to be reviewed, has not been reported. Said per curium opinion and order, dated January 29, 1969, is printed in Appendix C hereof, Ante.

An extension of time within which to file this petition for writ of certiorari was granted by order of Justice Hugo Black, dated February 28, 1969, said extension to extend to and through March 15, 1969.

## JURISDICTION

It is believed that 28 U.S.C., Sec. 1254 (1), and Supreme Court Rule 19, Paragraph 1 (b), confer jurisdiction upon the Supreme Court to review the judgment of affirmance and order denying rehearing

in this case by writ of certiorari.

QUESTIONS PRESENTED FOR REVIEW

QUESTION ONE

In the face of the rule of this Court announced in Ex Parte Bain, 121 U.S. 1, (1887); and followed in Stirone v. United States, 361 U.S. 212, (1960), that:

> "...a court cannot permit a defendant to be tried on charges that are not made in the indictment against him.";

in face of the Third Circuit Court of Appeals' holding in United States v. Roach, 321 F2d 1, C.C.A. 3rd., (1963), that a violation of this rule is such fatal and plain error that it can be raised for the first time on appeal; considering the fact that the indictment does not charge petitioner with the crime of conspiracy to defraud the United States under 18 U.S.C., Sec. 371 or under any other act of Congress; considering the fact that the only conspiracy charged against petitioner in the indictment is conspiracy to transfer stolen motor vehicles in

interstate commerce, under 18 U.S.C., 371 and 18 U.S.C., 2312; and considering the fact that the trial Judge (without forewarning petitioner and without objection from petitioner) did instruct the jury on the crime of conspiracy to defraud the United States under 18 U.S.C., Sec. 371, the conspiracy statute, including among such instructions on conspiracy to defraud (after a reading of 18 U.S.C., Sec. 371, to the jury, en toto) the following:

> "...Now, in connection with that definition, you are instructed that the reference of the conspiracy to commit or defraud the United States as defined in 371 in this case now on trial, being -- is a felony, and it lies under Article 2312 of Title 18, which is known--commonly known as the Dyer Act..." (R. 1941);

THE QUESTION HERE PRESENTED (which the Court of Appeals has, without writing on it, answered in the negative) is whether the trial Court's act of instructing the jury on the crime of conspiracy to defraud the United States enlarged on the charges

contained in the indictment, thus prejudicing petitioner to such a degree as to deny him his right to a fair and impartial trial conducted under his Constitutional guarantees to be tried under due process of law, and to be held to answer to a charge of crime ONLY under an indictment returned by the grand jury.

QUESTION TWO

In the face of the rule of this Court announced in Ex Parte Bain, 121 U.S. 1, (1887), and followed in Stirone v. United States, 361 U.S. 212, (1960), that:

> "...a court cannot permit a defendant to be tried on charges that are not made in the indictment against him.";

in face of the Third Circuit Court of Appeals' holding in United States v. Roach, 321 F2d 1, C.C.A. 3rd., (1963), that a violation of this rule is such fatal and plain error that it can be raised for the first time on appeal; considering the fact that the indictment does not charge petitioner with causing or wilfully causing the transportation of a stolen

motor vehicle in interstate commerce under 18 U.S.C., Sec. 2 (b) and Sec. 2312; considering the fact that COUNT FOUR (R. 10) of the indictment restricted itself to the words "...aided, abetted, counseled, induced and procured the commission of the foregoing offense...", as such charging words are contained in 18 U.S.C., Sec. 2(a); considering the fact that the grand jury could (but chose not to) have charged petitioner under 18 U.S.C., Sec. 2 (b) which is the "Whoever wilfully causes..." portion of 18 U.S.C., Sec. 2; considering the fact that the trial Judge, however, (without warning and without objection from petitioner) did, after defining "cause" to the jury, instruct the jury that if petitioner wilfully caused the transportation of a stolen motor vehicle in interstate commerce that he would be guilty (R. 1921-1924); and considering the fact that the point of error was first raised in the Court of Appeals; THE QUESTION HERE PRESENTED (which the Court of Appeals, without writing on the point,

answered in the negative) is whether the trial Court's act of instructing the jury (that if petitioner wilfully caused the transportation of a stolen motor vehicle in interstate commerce that he would be guilty) enlarged on the charges contained in the indictment, thus prejudicing petitioner to such a degree as to deny him his right to a fair and impartial trial conducted under his Constitutional guarantees to be tried under due process of law, and to be held to answer to a charge of crime ONLY under an indictment returned by the grand jury.

QUESTION THREE

Whether the Court of Appeals, in failing to reverse on the points of error as set out in QUESTION ONE and QUESTION TWO, above, has correctly applied the pertinent holdings as announced by the Supreme Court in Ex Parte Bain, 121 U.S. 1, (1887), and Stirone v. United States, 361 U.S. 212, (1960), and has correctly applied the holding as announced by the Third Circuit Court of Appeals in United

States v. Roach, 321 F2d 1, C.C.A. 3rd., (1963); and whether the opinion of the Court of Appeals is in conflict with these three decisions.

QUESTION FOUR

In the face of the holding of the Court of Appeals for the Seventh Circuit in United States v. Balodimas, C.A. 7th, 177 F2d 485, (1949), which held that a jury instruction almost identical to the one herein complained of was error of such magnitude that the failure to object at the time of trial was no bar to reversal; in face of the fact, however, that in the case at bar this petitioner did timely object, with the Government prosecutor joining in petitioner's objection; and considering the fact that no party to the trial had requested an instruction concerning accomplice testimony; THE QUESTION HERE PRESENTED is whether the trial Court's instruction to the jury that:

> "The witnesses, Hinton, Badger, Branton, and Boyd, are accomplices of the defendants in this case...", and that..

> "An accomplice is one who voluntarily and with common intent participates with another person or persons in the commission or planning of a crime." (R. 1913-1914),

amounted to an instruction that the witnesses, Hinton, Badger, Branton and Boyd participated with petitioner in the commission or planning of the crimes charged against petitioner in this case; considering the fact that all said witnesses were alleged in COUNT ONE of the indictment (R. 8-9) to be co-conspirators with petitioner; considering the fact that the witnesses, Badger, Branton and Boyd were all charged as co-defendants with petitioner; and considering the fact that petitioner was charged in the indictment with having "...aided, abetted, counseled, induced and procured the commission of..." the crime alleged to have been committed by the witness, Branton, in COUNT FOUR (R. 10) of the indictment; and thus WHETHER such instructions invaded the province of the jury to such extent as to deny petitioner his rights to trial by jury, to receive a fair and impartial trial,

and to be deprived of his liberty, if at all, under due process of law.

QUESTION FIVE

Whether the Court of Appeals, in failing to reverse on the points of error contained in QUESTION FOUR, above, has correctly applied the pertinent holdings announced by the Court of Appeals for the Seventh Circuit in United States v. Balodimas, C.A. 7th, 177 F2d 485, (1949), citing the Supreme Court in Holmgren v. United States, 271 U.S. 509, and as announced by the Court of Appeals for the Second Circuit in United States v. Beadon, C.A. 2d., 49 F2d 164, 169, (1931), cert. denied, 284 U.S. 625; and whether the opinion of the Court of Appeals is in conflict with these said decisions.

QUESTION SIX

In approaching this question it is necessary to consider the following circumstances, to wit:

(a) That petitioner was being tried for transporting stolen motor vehicles in interstate

commerce;

(b) That it was the Government's theory clearly declared to the jury that petitioner was head of a large car theft ring that attempted to disguise stolen cars by exchanging the public vehicle identification serial numbers with those of a legitimate wrecked car of the same make and model;

(c) That the Government called as its witness, an F.B.I. agent, who testified in response to the Government's questions, that there were confidential as well as public vehicle identification numbers located on the motor vehicles in question, that he had inspected said vehicles, had found false and/or tampered with public serial numbers, but by virtue of the confidential serial numbers had established the true identity of said automobiles as being stolen cars;

(d) That on cross examination of this witness, petitioner's attorney (after first establishing that parts of automobiles, including portions of the

frames, were frequently interchanged in the legitimate process of rebuilding damaged automobiles) asked this witness where the confidential numbers were located on the cars in question;

(e) That Government counsel immediately objected in the presence and hearing of the jury to the disclosure of the location of said confidential numbers, stating that there was no issue in the case that required the disclosure of the location of:

> "...the confidential number which apparently is placed there to avoid just the kind of circumstances we are dealing with in this case. To disclose the location would seriously impair investigations of this kind and contribute substantially to success of operations like this in some future case." (R. 1172);

(f) That petitioner's motion for mistrial, based on these remarks, was denied;

(g) That Government counsel did not withdraw his remarks;

(h) That petitioner's attorney failed to ask for instructions to disregard; and

(i) That the trial Judge gave no mind cleansing instructions to the jury;

therefore, THE QUESTION HERE PRESENTED is whether Government counsel's remarks reasonably inferred:

(1) That petitioner would be more successful in the future operation of his car theft ring in some future case of car theft and attempted disguise of a stolen car, if the witness were forced to disclose to petitioner the location of the confidential number, which would enable petitioner to tamper with the confidential number as he had been tampering with the public serial numbers on stolen cars, which was the purpose government counsel's remarks attributed to the asking of the question; and

(2) That this criminal purpose (to enable petitioner to be better able to disguise stolen cars in the future by tampering with the confidential numbers) was the true and only purpose that petitioner's attorney could have had in asking such

a question since no issue in the case required disclosure of the location of the confidential numbers; and WHETHER such inference was so prejudicial to petitioner and his attorney (for it was the attorney who asked the question) as to deny petitioner his right to effective assistance of counsel as well as a fair and impartial trial, conducted under due process of law, with a verdict returned by a fair and impartial jury that was not swayed by prejudice against petitioner created by false, unsworn and uncalled for testimony by Government counsel that was not subject to cross examination.

QUESTION SEVEN

Whether the trial Court's denial of petitioner's motion for mistrial, based on the circumstances set out, and the remarks complained of, in QUESTION SIX, above, was prejudicial error requiring reversal; and whether the trial Court's failure to instruct the jury to disregard said remarks, even though such an instruction was not requested by petitioner, was prejudicial error requiring reversal.

QUESTION EIGHT

Considering the complained of remarks of Government counsel and the circumstances surrounding them, as set out in QUESTION SIX and QUESTION SEVEN, above, THE QUESTION HERE PRESENTED is whether Government counsel's remarks reasonably inferred to the jury that petitioner (while on trial for conspiracy, in front of the Judge, the jury and the prosecutor) was surreptitiously engaged in carrying out a conspiracy with his attorney by attempting to use the power of the District Court, through cross examination, to force the F.B.I. to divulge the secret location of the confidential numbers, for the illegal purpose of updating and improving upon the operation of his car theft ring in the future; and WHETHER such inference was so prejudicial to petitioner and his attorney (for it was the attorney who asked the question) as to deny petitioner his right to effective assistance of counsel as well as a fair and impartial trial, conducted under due

process of law, with a verdict returned by a fair and impartial jury that was not swayed by prejudice against petitioner created by false, unsworn and uncalled for testimony by Government counsel that was not subject to cross examination.

QUESTION NINE

Whether the Court of Appeals, in failing to reverse on the points of error as set out in QUESTION SIX, QUESTION SEVEN, and QUESTION EIGHT, above, has correctly applied the pertinent holdings as announced by the Supreme Court in Williams v. United States, 168 U.S. 382, (1897); Viereck v. United States, 318 U.S. 236, (1943); and in Stewart v. United States, 366 U.S. 1, (1961); and announced by the Ninth Circuit Court of Appeals' decision in Taliaferro v. United States, 47 F2d 699, 701, (1931); by the Court of Appeals of Pennsylvania in United States v. Sprengle, C.C.A. Pa. 103 F2d 876, (1939); and by the Court of Appeals of Colorada in Langford v. United States, 178 F2d 48, (1950); and

whether the opinion of the Court of Appeals is in conflict with these said decisions.

QUESTION TEN

Whether the trial Court's failure to deliver a written copy of his oral charge to the jury, as requested by petitioner (R. 1934-1935) immediately after the Court had finished reading it to the jury the first time, was so prejudicial to petitioner as to deny him a fair and impartial trial, conducted under due process of law, with the verdict rendered by a jury that is furnished the necessary tools with which to arrive at an intelligent verdict arrived at under the exact guidelines of the written law; considering the fact that the jury was attempting to cope with the complex and confusing laws and rules concerning conspiracy as well as being faced with the Dyer Act entertwined with the aiding and abetting Act; considering the fact that the jury deliberated almost three days, during which time it sent out two questions, both of which were inquiring

about conspiracy, the second question specifically asking for a "written" definition of conspiracy; considering the fact that the trial Judge, in refusing to grant their request for a "written" definition stated to the jury that charges to the jury in the Federal Practice were given orally, not in written form, and considering the fact that this was a multiple defendant case.

QUESTION ELEVEN

Whether the trial Court's failure to deliver a "written" definition of conspiracy to the jury as the jury had requested in its second and last question it sent out (received at a time when the Court was obviously aware that the jury was in a state of confusion concerning conspiracy) was so prejudicial to petitioner as to deny him a fair and impartial trial, conducted under due process of law, with the verdict rendered by a jury that was furnished the tools necessary to its fair and intelligent understanding of the law during its deliberations.

QUESTION TWELVE

Whether a jury can reasonably, intelligently, fairly, and impartially perform its function as contemplated by the United States Constitution, Amendment VI, and render just verdicts under due process of law as contemplated by the United States Constitution, Amendment V, when the jurors are denied the assistance and opportunity to study a written copy of the Court's charge?

QUESTION THIRTEEN

Whether the Court of Appeals, in failing to reverse on the points of error as set out in QUESTION TEN, QUESTION ELEVEN and QUESTION TWELVE, above, has correctly applied the pertinent holding as announced by the Ninth Court of Appeals in Oertle v. United States, C.C.A. 9th, (1966) 370 F2d 719; has correctly followed the mandate of the Constitution Of The United States, Amendments V and VI; and whether the opinion of the Court of Appeals is in conflict with same.

QUESTION FOURTEEN

Whether the trial Court erred in ordering petitioner's attorney not to comment on or allude to the failure of any defendant to take the witness stand during his jury argument, lest said attorney be held in contempt of Court. This order was made some five days before the trial testimony began and came unsolicited from any defendant. And whether the Court further erred in not granting petitioner's motion for mistrial made at the conclusion of the jury arguments and prior to the charge being read to the Jury, on the ground that the effectiveness of petitioner's jury argument had been seriously impaired.

QUESTION FIFTEEN

Whether the Court of Appeals, in failing to reverse on the points of error as set out in QUESTION FOURTEEN, above, has correctly applied the pertinent holdings of the Eighth Circuit Court of Appeals in Hayes v. United States, 329 F2d 209 (8 Cir. 1964), cert. denied 377 U.S. 980; its own

holdings in De Luna v. United States, 308 F2d 140 (5 Cir. 1962), reh. den. 324 F2d 375; Barton v. United States, 263 F2d 894, and Schaffer v. United States, 221 F2d 17 (5 Cir. 1955); and whether the Court of Appeals is in conflict with these cases.

QUESTION SIXTEEN

Whether the trial Court erred in denying petitioner's motion to have the government witness, Richard Hinton, examined by a doctor or other competent experts to determine his competency to testify, in view of the testimony concerning his addiction to narcotics at the time Hinton was allegedly conspiring with petitioner, and his obviously impaired ability to remember, understand or relate truthfully events as they happened. (R.727-728).

QUESTION SEVENTEEN

Whether the Court of Appeals, in failing to reverse on the point of error as set out in QUESTION SIXTEEN, above, has correctly applied the pertinent

holdings as announced in the Supreme Court in Manfredonia v. United States, 374 U.S. 1020, and Smith v. United States, 349 U.S. 932; and as announced by the Circuit Court of the District of Columbia in Carrado v. United States, 210 F2d 712 (D.C. Cir. 1953) as announced by the Second Circuit Court of Appeals in United States v. Tannuzzo, 174 F2d 177 (2 Cir. 1949), cert. den. 338 U.S. 815, and as announced by the Ninth Circuit Court of Appeals in Brown v. United States, 222 F2d. 293 (9 Cir. 1955); and whether the Court of Appeals is in conflict with these cases.

QUESTION EIGHTEEN

Whether the trial Court erred in allowing the Government to bring out, on cross examination of petitioner, the fact that petitioner had been convicted of two felony crimes, in face of petitioner's motion in limini, addressed to remoteness, the fact that petitioner held a full pardon from the State of Texas, and to prejudice, since petitioner's con-

viction for car theft was some 18 years before the trial, his conviction for accomplice to armed robbery occurred some 15 years prior to the trial, and he had long since obtained his full pardon. (R.118-119, 1521, 1527, 1650-1653).

QUESTION NINETEEN

Whether the Court of Appeals, in failing to reverse on the points of error as set out in QUESTION EIGHTEEN, above, has correctly applied the pertinent holdings as announced in the Circuit Court for the District of Columbia in Richards v. United States, 192 F2d 602 (D.C. Cir. 1951), cert. den. 342 U.S. 946; and as announced in the cases cited in Goddard v. United States, 131 F2d 220 (5 Cir. 1942); and whether the Court of Appeals is in conflict with these cases.

QUESTION TWENTY

Whether the trial Court erred in not allowing petitioner's attorney to cross examine the Government witness, James R. Powers, an F.B.I. agent, as

to the location of the so-called "secret" or "confidential" vehicle identification numbers on the automobiles in question, a 1966 Pontiac Catalina and a 1966 Pontiac Bonneville, after the government, on direct examination, had elicited testimony from said witness that he had looked at the "secret" or "confidential" numbers on said vehicles, and thus had determined the true identity of said cars which said true identity revealed them to be stolen cars, and the Court further erred in not granting petitioner's motion to strike this testimony after denying petitioner the right to cross-examine as to the location of said numbers. All of which was highly prejucicial to petitioner since the Government had to prove that the 1966 Pontiac Catalina and the 1966 Pontiac Bonneville (sold by Louis Del Branton, alias Don Duryea, in Las Vegas, Nevada) either one or both of said cars, were in fact stolen cars, before the jury could convict this petitioner on Count IV. Whether these cars were or were not stolen cars went to the very heart of the

case.

QUESTION TWENTY ONE

Whether the Court of Appeals, in failing to reverse on the points of error as set out in QUESTION TWENTY, above, has correctly applied the pertinent holding as announced by the Supreme Court in Alford v. United States, 282 U.S. 687; and as announced by the Fifth Circuit Court of Appeals in its opinion in Williamson v. United States, 272 F2d 495 (5 Cir. 1959) cert. den. 362 U.S. 920; and whether the opinion of the Court of Appeals is in conflict with these cases.

QUESTION TWENTY TWO

Whether the trial Court erred in admitting Government's Exhibit 5 into evidence, over petitioner's objections, further erred by failing to exclude the offending instrument contained in said Exhibit 5 from the jury's consideration, on motion by petitioner, and further erred by sending, unrequested, said exhibit into the jury room at the

evidence indicating guilt was neither credible nor substantial, the Government's own evidence disproved its case against this petitioner, and whether the trial Court erred when it denied appellant's motions for judgment of acquittal made when the Government rested its case, when appellant rested his case, and when the Government and all defendants rested and closed their respective cases.

QUESTION TWENTY FIVE

Whether the Court of Appeals, in failing to reverse on the points of error set out in QUESTION TWENTY FOUR, above, has correctly applied the pertinent holdings as announced by the Supreme Court in Glasser v. United States, 315 U.S. 60, 80 (1941); and as announced by other Circuit Courts of Appeals in the following cases:

> Jones v. United States, 262 F2d 44, Walker v. United States, 254 F2d 509, Escalante v. United States, 228 F2d 61, Williams v. Butterfield, 145 F. Supp. 567, affirmed 250 F2d 127, rehearing denied 253 F2d 709; (cases on identification of accused).

as announced by the Eighth Circuit Court of Appeals

in Dahly v. United States, (C.S.8), 50 F2d 37, in Sykes v. United States, (C.A. 8), 204 F. 909, 913, in Haakinson v. United States, (8 Cir), 238 F2d 775; and whether the opinion of the Court of Appeals is in conflict with these cases.

QUESTION TWENTY SIX

Whether the trial Court erred by instructing the jury that "...if the jury believes the testimony of an accomplice to be true beyond a reasonable doubt, that testimony is sufficient to convict the defendants, even though it is not corroborated by any other evidence, "after first having instructed the jury that "The witnesses, Hinton, Badger, Branton and Boyd, are accomplices of the defendants in this case..." (R. 1914).

QUESTION TWENTY SEVEN

Whether the Court of Appeals, in failing to reverse on the points of error as set out in QUESTION TWENTY SIX, above, has correctly applied the pertinent holding of the Supreme Court in Harnung

v. District of Columbia, 254 U.S. 135; and correctly applied the holdings of the Court of Appeals for the Eighth Circuit in Hewitt v. United States, (C.A. 8th 1940), 110 F2d 1; and correctly applied the holding of the Court of Appeals in Stoneking v. United States, 232 F2d 385; and whether the opinion of the Court of Appeals is in conflict with these cases.

QUESTION TWENTY EIGHT

Whether the trial Court erred in denying petitioner's motions for new trial based on newly discovered evidence that James Boyd, a Government witness, had falsified when he denied to the jury that he had been made any promises of leniency by the Government in return for his testimony...such falsity being known to the Government prosecutors at the time, who chose to stand mute; considering the fact that petitioner had a motion on file seeking a hearing in order to put on additional evidence; and considering the fact that the trial court, without notice to petitioner, denied the motion, without

a hearing, on the basis of the moving and counter affidavits.

QUESTION TWENTY NINE

Whether the Court of Appeals, in failing to reverse on the points of error as set out in QUESTION TWENTY EIGHT, above, has correctly applied the pertinent holdings as announced in three of its own cases, to wit:

Lyles v. United States, 272 F2d 910 (5 Cir. 1959), cert. denied 356 U.S. 931, Hawkins v. United States, (5 Cir. 1963), 324 F2d 873, and Everitt v. United States, (5 Cir. 1965), 353 F2d 532; and whether the opinion of the Court of Appeals is in conflict with these cases.

QUESTION THIRTY

Whether the trial Court erred when it denied petitioner's motion for severance under the circumstances that this action forced petitioner to change his trial strategy, caused petitioner to lose control of his defense, and denied petitioner

effective assistance of counsel, all to petitioner's extreme prejudice, and in derogation of his right to a fair and impartial trial. (R. 56-58, 67-68, 80-81, 83-84, 120-123, 650-652). Overruled (R.700).

QUESTION THIRTY ONE

Whether the Court of Appeals, in failing to reverse on the points of error as set out in QUESTION THIRTY, above, has correctly applied the pertinent holding by the Supreme Court in Opper v. United States, 348 U.S. 34 (1954); has correctly applied the pertinent holdings of the Eighth Circuit Court of Appeals as announced in United States v. Echles, (C.A. 8, 1965), 352 F2d 892; has correctly applied the holdings in its own Circuit as announced in Schaffer v. United States, 221 F2d 17 (5 Cir. 1955), Barton v. United States, 263 F2d 894 (5 Cir. 1959), in Belvin v. United States, 273 F2d 583, (5 Cir. 1960).

QUESTION THIRTY TWO

Whether the trial judge fatally amended count one of the indictment, the conspiracy count, when he struck from count one, two of the overt acts charged therein, such overt acts being the acts as described in Count two and Count Five of the indictment.

QUESTION THIRTY THREE

Whether the trial judge committed prejudicial error in admitting the evidence obtained in the searches and seizures as described in the Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit filed by petitioner, Michael Joseph Gurleski, in the Supreme Court of the United States. Petitioner, Frank Smith, adopts and incorporates the questions on unreasonable search and seizure raised by Michael Joseph Gurleski in his said petition for certiorari now pending in this Supreme Court of the United States.

QUESTION THIRTY FOUR

Considering the fact that there was testimony that Louis Del Branton drove a stolen 1966 Pontiac

Catalina in interstate commerce part of the way from Austin, Texas to Las Vegas, Nevada; consider the fact that there was also evidence that Louis Del Branton, also on this same trip, drove a stolen 1966 Pontiac Bonneville in interstate commerce at least part of the way; considering the fact that the stolen motor vehicle involved in count two of the indictment was described only as a "1966 Pontiac"; considering the fact that the stolen motor vehicle involved in Count four of the indictment was described only as a "1966 Pontiac"; and considering the fact that petitioner asked for a bill of particulars to more fully and specifically identify the "1966 Pontiac" referred to in Counts II and IV of the indictment specifically asking if the "1966 Pontiac" in Count II was one and the same "1966 Pontiac" as the one referred to in Count IV; THE QUESTION HERE PRESENTED is whether the trial judges denial of petitioner's request for such bill of particulars was such prejudicial error as to require a revisal since petitioner now stands

convicted on Count IV of transporting a stolen "1966 Pontiac" in interstate commerce, and because of the facts and circumstances involved would be unable to successfully plead prior conviction or double jeopardy to any possible future indictment for aiding and abetting the transportation of either a stolen "1966 Pontiac Bonneville" or a stolen "1966 Pontiac Catalina", since the record does not show on which car his conviction is based.

## STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes involved are:

18 U.S.C., Sec. 371, which reads:

> "If two or more persons conspire to commit any offense against the United States, or to defraud the United States, or any agency thereof, in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00, or imprisoned not more than five years, or both. If, however, the offense the commission of which is the object of the conspiracy is a misdemeanor only, punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

18 U.S.C., Sec. 2312, which reads:

> "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000.00 or imprisoned not more than five years, or both."

18 U.S.C., Sec. 2, which reads:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> "(b) Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

The Constitutional provisions involved are:

United States Constitution, Amendment V, which reads:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

United States Constitution, Amendment VI, which reads:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense."

## STATEMENT OF THE CASE

This is a multiple defendant case. It involves an alleged conspiracy to commit violations of the Dyer Act, as well as alleged substantive violations of the Dyer act combined with charges of aiding and abetting these substantive violations. Jury trial was had in the Hon. The United States District Court of the Western District of Texas, Austin Division, on all five counts of the indictment. Counts I (conspiracy), III and IV (substantive Dyer act violations combined with aiding and abetting) were submitted to the jury for verdict, Counts II and V having been dismissed or abandoned when the Government rested its case. Of the nine defendants named in the indictment, only five went to trial: Charles Garner, Ellis Woods, Frank Smith, Michael Joseph Gurleski and Dorothy Villa-Franca. All except this petitioner, Frank Smith, were found guilty on all three counts submitted to the jury. Petitioner, Frank Smith, was found guilty on Count I,

not guilty on Count III and guilty on Count IV. Petitioner Smith was sentenced to serve five years on both Counts I and IV, the sentences to run concurrently.

Basically, Count I alleged that petitioner, Frank Smith, and the other eight defendants as well as Richard Hinton, named as a conspirator but not as a defendant, conspired (between November 2, 1966, and November 15, 1966) to violate Title 18, United States Code, Section 2312 by agreeing and conspiring to transport stolen motor vehicles in interstate commerce, in violation of Title 18, United States Code, Section 371, the conspiracy statute. Count I charged that the scheme consisted generally of obtaining a certificate of title, license plate and vehicle identification plate from a wrecked, late model car, then stealing a car of same make and model, removing its identification, substituting and attaching to the stolen car the identification obtained from the wrecked car in order to disguise

its identity, then driving the stolen car from Texas to other states in the United States of America and selling it there. Also, some six overt acts were alleged. Petitioner Smith is and was at the pertinent times in the automobile salvage business in Austin, Texas, operating a large salvage business there. The government's theory was that petitioner Smith's part of the conspiracy scheme was to furnish the certificates of title, license plates and vehicle identification plates off his wrecked vehicles for purposes of attaching same to the stolen vehicles and thereby make it more difficult to detect the stolen vehicles after they were sold. Two of the overt acts charged in Count I were to this effect. (Count I, R. 8-9).

Count IV of the indictment charged:

> "On or about November 3, 1966, Louis Del Branton knowingly, wilfully and unlawfully transported a stolen motor vehicle, that is, a 1966 Pontiac, in interstate commerce, from the Western District of Texas to the State of Nevada, then knowing said motor vehicle to have been stolen; in violation of Title 18, United States Code, Section 2312.

> "Michael Joseph Gurleski, Dorothy Villa-Franca, Frank Smith, Charles Garner, Ellis Woods and William Badger aided, abetted, counseled, induced and procured the commission of the foregoing offense. Title 18. United States Code, Section 2." (Count IV, R. 10).

At the outset the trial Judge set the following ground rules, that any motion and/or objection made by any defendant as well as the Court's ruling thereon would go to the benefit of and be the motion and/or objection of all other defendants. Included in this ground rule were any and all pre-trial motions. (R. 700-701, 706-707, 719).

James Alford Boyd, Donald Ray Childress, William Badger, and Louis Del Branton entered pleas of guilty to conspiracy, Count I. Louis Del Branton pleaded guilty to Count IV, as well.

This petitioner, Frank Smith, with two strikes against him because of his previous criminal record, yet being the one defendant who presented any problem of conviction, was convicted solely on the testimony of Richard Hinton and James Alford Boyd.

Richard Hinton, a professional testifier, has literally been put on tour by the Government. Hinton has become the Government's circuit-witness, so to speak, making a circuit of the conspiracy trials, taken as a prisoner from courtroom to courtroom to point his tarnished finger-of-guilt at defendants in United States Government conspiracy trials, i.e., the Jarrel bank burglary case; an intimidation of a Government witness case; this case against petitioner Frank Smith, and the other defendants; and more recently testifying ardently in the United States District Court at El Paso, Texas, about prostitutes plying their trade in interstate commerce to finance the operations of an alleged bank burglary ring.

This petitioner is not accused in any of these other conspiracy cases. Nor is he in any way involved in them. But petitioner is certain that if the Government had, even accidentally, nodded in this petitioner's direction in these other conspiracy cases, that such a nod would have cocked Hinton, once

again, for additional perjury, that Hinton would have been equal to the suggestion, once again, (given a few days of creative repose), and petitioner would, thereafter, have found himself, once again, falsely enmeshed in conspiracies to burglarize banks, threaten government witnesses, commit interstate prostitution, or any number of other crimes the fear-filled, heroin-riddled mind of Richard Hinton could concoct for appellant's conviction and the Government's applause.

James Alford Boyd, a professional criminal, frantically seeking probation, which he erroneously thought he had, for his testimony, sought to convict petitioner by false testimony relating to alleged conversations concerning criminal acts he says he had with petitioner almost a year prior to the alleged beginning of the conspiracy charged in the case now before this Supreme Court. Part of Boyd's testimony has since been recanted, and petitioner has on file in the record, an affidavit from the defendant, Charles Garner, stating that

Boyd confessed to Garner, after the trial and the sentence of Boyd, that Boyd had, in fact, been promised probation by the Government in return for his testimony, which promises of leniency he had denied at the trial.

The testimony of Hinton, who the record shows to be an admitted heroin addict, is inherently incredible, and Boyd is unworthy of belief.

It is petitioner's contention that because of his previous criminal record, occurring 15 to 17 years ago, for which he has long since received a pardon, and because of petitioner's name being on some car title histories involved in this case, that the Government had a preconceived idea of petitioner's guilt, that this suggestion of guilt was made to Boyd and Hinton and these two paragons of veracity proceeded to fabricate their falsehoods and weave the web of guilt around Frank Smith that resulted in his conviction.

## REASONS FOR GRANTING THE WRIT

### Reason One

The opinion of the Court of Appeals in holding that there is sufficient credible and substantial evidence to uphold the verdict convicting petitioner, Frank Smith, as to conspiracy to violate the Dyer Act, COUNT ONE of the indictment, and convicting petitioner of aiding and abetting in a substantive Dyer Act charge, COUNT FOUR of the indictment, is directly in conflict with its own opinions, with holdings of other Courts of Appeal and with the opinions and holdings of this Supreme Court in the following cases, hereinafter cited, as related to the following rules of law and their applications to the evidence in petitioner's case, to wit:

A.

Identity Of The Accused

As a basic and continuing premise following all arguments on insufficiency of the evidence, petitioner contends that the government's case

against Frank Smith must stand or fall on the basis of the sufficiency of the witness, Hinton's, testimony, and on his competency as well. The only other government witness, James Alford Boyd, testified to dealings he had with a Frank Smith more than a year prior to the alleged crimes charged in the indictment; and by itself, Boyd's testimony, even if assumed to be true, could in nowise be sufficient to convict petitioner.

Petitioner asserts that even if he was sufficiently identified as the Frank Smith who Hinton's testimony referred to, that Hinton's testimony was insufficient to sustain a verdict of conviction; which argument is presented later herein. But before going into that area of the argument, petitioner urges first that he was not sufficiently identified as the Frank Smith or Mr. Smith that Hinton's testimony referred to.

Reasons:

(1) When Hinton identified a person in the

courtroom as being named Frank Smith, he did not identify that person he was referring to as being one and the same as the defendant, Frank Smith. (R. 743-744).

(2) When Hinton testified that he had known a Frank Smith for about a year, (R. 745) he did not specify or imply whether he was referring to Frank Smith, the defendant, or whether he was referring to the other Frank Smith who was a witness at the trial and worked at the same wrecking yard at the pertinent times Hinton testified he had his allegedly criminal dealings and conversations with a Frank Smith regarding the purchase of some car titles. Under the circumstances, Hinton's testimony could have referred to the other Frank Smith as well as it could have related to petitioner. Or it could have related to some third Frank Smith.

(3) Throughout the entirety of Hinton's lengthy testimony he referred to a FRANK Smith, petitioner believes, no more than ten or twelve

times. None of these times was he asked or did he say that he was referring to Frank Smith, the defendant. The balance of his testimony was about a "MISTER Smith", and the government prosecutor addressed his questions to Hinton only three or four times as to a FRANK Smith. All the prosecutor's many other questions to Hinton were about a MISTER Smith, and none of the prosecutor's questions to Hinton were directed at either Frank Smith, the defendant, or to a Mister Smith, the defendant, or even to the defendant.

(4) All of Hinton's testimony of an incriminating nature, if it was incriminating at all, could have as easily referred to Frank Smith, the defendant, as to the other Frank Smith who testified at petitioner's trial; but not to both of them, since the other Frank Smith, the record shows, worked at the same place of business, a wrecking yard, where petitioner worked, selling cars and parts and signing car titles (just as petitioner did), (R.1631 and all of Frank H. Smith, Jr.'s testimony), since this

other Frank Smith worked there during the same pertinent periods of time when Hinton testified he had his dealings with a "Mister Smith", and since Hinton testified that whenever he talked to a Mr. Smith or a Frank Smith that no one else was present.

(5) Petitioner took the stand and denied all of Hinton's testimony insofar as it related to him, with the exception that he admitted that he knew Hinton. (R. 1611-1624, 1635, 1629).

(6) The indictment is against a Frank Smith. The government prosecutor took it upon himself, without any provocation from petitioner or petitioner's counsel, to prove up that petitioner's true and legal name is not Frank Smith but that it is Frank Huey Smith.

Q: Your name is Frank H. Smith? A: That's correct.
Q: "H" is for "Huey"? A: That's correct. (R.1650)

(7) In none of Hinton's or Boyd's testimony, in none of the car title histories introduced into

evidence, is there any mention of a Frank Huey Smith.

(8) Petitioner timely made motions for judgment of acquittal on the insufficiency of the evidence when the government rested, when petitioner rested and when all parties closed.

Considering the foregoing circumstances has petitioner been sufficiently identified as the person the grand jury indicted, and if he has been sufficiently so identified, has petitioner been sufficiently identified as the Mr. Smith or the Frank Smith to whom Hinton's testimony referred? Petitioner contends that the failure of proof as to his identity is sufficient, by itself, to reverse the verdict, considering the foregoing facts and following authorities, as well as the holdings of this Court and other Circuit Courts which are in conflict with the Court of Appeals' opinion in Petitioner's case, to wit:

(a) 23 C.J.S., Criminal Law Sec. 920, at page 643:

> "Although the connection of the accused with the offense need not be so strong as to amount to a demonstration, the evidence, to warrant a conviction, must establish beyond a reasonable doubt the identity of the accused as the person who committed the crime."

(b) In Butler v. U.S., 317 F2d 249, 8 Cir., 1963, the Court of Appeals at page 254, said:

> "The authorities dealing with the general subject of identification of the accused, and particularly with the quantum and quality of proof required to establish this element of a criminal case, uniformly hold that proof of the identity of the person who committed the offense is essential to a conviction."

In Butler at page 254, the Court, in stating the appellant's position, stated:

> "...notwithstanding the existence of evidence which established that persons bearing the names of these appellants were associated with Lenders...", (Lenders was a co-defendant corporation)..."...no witness connects such names with the corporeal defendants on trial."

In Butler, the Eighth Circuit, in rejecting this contention, said that "...an examination of the record in totality..." impelled the conclusion "...that they tacitly admitted their identity and participation in the fraudulent operations." The

Court based its decision on the fact that the appellants did not take the stand and deny the accusations, and upon the fact that defense counsel had identified their clients with the Lenders corporation's operation. Petitioner has read the Soliciter General's "Brief For The United States In Opposition" to the petition for certiorari filed in this Supreme Court, to wit: Benedec, et al., v. U.S., 375 U.S.836, No. 256, October term, 1963, seeking review of the Eighth Circuit's affirmance in Butler, and found in the Soliciter General's brief at page 7-9 that the defense attorneys had not only introduced their clients to the jury by name but stated to the jury the respective offices they held in the Lender's corporation, and spoke of their client's participation "...in good faith" in the company's business. Thus it was that in Butler the Eighth Circuit determined that the defendants there had "...tacitly admitted their identity and participation in the fraudulent operations." No

such admissions exist in the record in Frank Smith's case, either tacitly or otherwise.

(d) In Wong Sun and James Wah Toy v U. S., 370 U.S. 908 this Supreme Court in reversing Toy's conviction, stated:

> "There is, however, nothing in the record which identifies James Wah Toy and Blackie Toy as the same person."

(e) In United States v. Metz and Kenneth Eugene Miller, 312 F2d 199, 6 Cir., 1963, the Sixth Circuit, at page 200, stated:

> "The co-conspirator of Metz is referred to throughout the testimony of Garland, the prosecuting witness, as Blackie. Trial counsel for the government also refers to him as Blackie. Metz testified that he knew a Blackie Miller in Chicago and that he always saw him when he went to Chicago. Nowhere in the record do we find any connection between Blackie or Blackie Miller and the Kenneth Eugene Miller, who stood trial in this case. For this reason, the judgment of conviction of the appellant, Kenneth Eugene Miller, is reversed..."

(f) In Dahly v. U.S., 50 F2d 37, 8 Cir. 1931, the Eighth Circuit, at page 42, stated:

> "Circumstantial evidence is equally available with direct evidence to prove the conspiracy, but suspicions or conjecture cannot take the

> place of evidence. Guilt must be established beyond a reasonable doubt, and, where the evidence is as consistent with innocence as with guilt, no conviction can properly be had." (Emphasis ours).

Petitioner contends that where the evidence is equally as consistent with a conclusion that someone other than petitioner was the party referred to in the incriminating testimony, as it is consistent with the conclusion that petitioner was the party referred to, that a conviction cannot stand. Since there is no direct evidence that Hinton was referring to the defendant, Frank Smith, then petitioner contends that the jury had only circumstantial evidence (if it had any evidence) that Hinton's testimony referred to this petitioner. This Supreme Court in 1954, in Holland v. U.S., 348 U.S. 121, at pages 139-140, held that it is "confusing and incorrect" to give an instruction to the jury that in a circumstantial evidence case that the evidence must exclude every reasonable hypothesis except that of guilt. Since that time some circuits have inter-

preted this holding of the Supreme Court to mean that it was also incorrect for the trial Judges and the Courts of Appeals to apply this exclusionary rule in circumstantial evidence cases in determining questions on the sufficiency of the evidence. The Fifth, Eighth, and Tenth Circuits, however, have not so interpreted the holding in the Holland case as applying to the Courts, and have continued to apply the exclusionary, reasonable hypothesis rule to circumstantial evidence cases when viewing the record on questions of insufficiency of the evidence. La Conte v. U.S., 330 F2d 700, 701, 10 Cir., 1964; Tri-Angle Club, Inc. v. U.S., 265 F2d 829, 8 Cir., 1959; and Cohen v. U.S., 363 F2d 321, 327, 5 Cir., 1966 are among the line of cases and circuits still applying the exclusionary, reasonable hypothesis rule in circumstantial evidence cases. In Cohen the Fifth Circuit said: "In the absence of direct proof, the circumstances relied upon to sustain a conviction must not only be consistent with guilt

but inconsistent with every reasonable hypothesis of innocence." However, the Fifth Circuit Court of Appeals, in petitioner's case, at least, appears to have abandoned the exclusionary rule. In 23 C.J.S., Criminal Law, Section 920, at pages 647-648, it is stated:

> "... circumstantial evidence may be sufficient to establish the identity of the accused as the person who committed the crime.... The circumstances proved must, however, lead to but one fair and reasonable conclusion pointing to accused to the exclusion of all others as the guilty person and exclude every other reasonable hypothesis except that of accused's guilt. So, although in order to convict it is not necessary to show that the crime could not have been committed by any person other than accused or that no other person had an opportunity to commit it, yet if the evidence shows or would admit of the guilt of one of two or more persons, to the exclusion of the other, and there is reasonable doubt as to which is the guilty party, the accused must be acquitted." (Emphasis ours). Emphasized rule citing: Middlebrook v. State, 56 S.W. 2d 872, 122 Tex. Cr. 559; People v. Brooks, 166 N.E. 35, 334 Ill. 549, People v. White, 333 Ill. 512; People v. Dante, 35 Ill. 2d 538; State v. Browder, 183 S.C. 447; Burton v. Commonwealth, 122 Va. 847.

B.

Assuming All of Hinton's Testimony To Be True, It Is Still Insufficient To Convict Frank Smith.

The Court of Appeals correctly held in its opinion that "There appears to be no direct evidence that Smith knew the cars were stolen...." The Court reached this inescapable conclusion because Hinton testified that he did not tell Smith about any stolen cars when he made his alleged deal with Smith that resulted in Hinton obtaining possession of the car titles, serial plates and license plates which Hinton later had attached to stolen cars. While Hinton was testifying the prosecutor asked:

> Q: Well, just relate, as best you can remember, the full conversation you had with Mr. Smith, backing up, beginning at the time you first went out there and asked him if you could buy the certificates from him. Just relate, as best you recall, what you said to him and what he said to you about those certificates of title?
>
> A: Well, I told him we were going to take the cars on the West Coast and sell them, and when I got back, well, I would give him what I owed him.

Q: Did you tell him that when you first went out and asked for the certificates?

A: Yes, sir.

Q: And is that in fact what you did?

A: Yes, sir. (R. 754-).

Later, on cross examination, in answer to defense counsel's question seeking to emphasize the fact that Hinton did not mention anything to Smith about any stolen cars Hinton testified:

Q: You were going to have him put his name, Frank Smith, on an automobile title, assigning it to somebody else, and told him when he did that, I am going to put--take this certificate of title; I am going to take these license plates, and I am going to take the serial plate, all of it reflected on this instrument that you signed and put your name on, I am going to take them, Frank Smith, and I am going to attach them to a stolen car, and I am going to not only do that; I am going to take them across a state line and get Uncle Sam after me. That's what you told him?

A: No, I didn't.

Q: And the reason you didn't tell him is because Frank Smith and nobody else would be hardly fool enough to do that, would they?

A: I got the titles from Mr. Smith. I got three of them. (R. 849-850).

In its opinion, the Court of Appeals, says the jury had the right to infer that Smith had knowledge that the cars were stolen because "There would be little other use for the preparation and delivery of certificates of titles, plates and a full set of papers on wrecked cars if such documents and equipment were not to be used to facilitate sales of stolen automobiles, in the absence of any showing that there was an actual sale of the wrecked cars matching the papers." (Emphasis ours). To conclude that there was no showing of an actual sale of the wrecked cars is to completely ignore Hinton's testimony that he told Smith that he was going to take the cars to the West Coast and sell them. Since Hinton did not mention any stolen cars to Smith what cars was Hinton referring to in his full conversation with Smith? Obviously, the only cars he could have been referring to, insofar as Smith was led to believe by what Hinton told him, were the wrecked cars that matched the titles and identi-

fication plates that Hinton was buying. The question is not what hidden and criminal purpose Hinton had hidden in his own mind when he misled Smith as to what his plans were, nor is it a question of what double meaning Hinton might have had in his own mind when he spoke to Smith of taking the cars to the West Coast. The question is what meaning his full conversation with Smith conveyed to Smith. And the only logical answer to that question is that it conveyed to Smith what it was intended to convey to him and what it would have conveyed to anyone else; that is, that Hinton intended to take the wrecked cars to the West Coast and sell them. There is no other conclusion, either reasonable or unreasonable, that can be reached since Hinton testified that he did not tell Smith about any stolen cars. To conclude otherwise is to find guilty knowledge in Smith's mind by investing him with the power of mental telepathy or mindreading, a device to obtain convictions that is unknown to

the law as yet, even in conspiracy prosecutions. Further, Hinton testified that he took these wrecked cars to the West Coast.

> Q: And a '66 Pontiac. And he gave all those license plates, serial plates, and certificates of title to those three cars to you into your hands there on the same day at his office?
>
> A: No, sir; I was--I got two of them one time, and then another one for the Volkswagen last. It was two different days.
>
> Q: Two different days; but you got them from Mr. Smith's hands; that is what I am talking about.
>
> A: Yes, sir.
>
> Q: All right; and at his office?
>
> A: Yes, sir.
>
> Q: And the vehicles that we are talking about are the ones that you took on to the West Coast and had Mr. Branton sell out there?
>
> A: Yes, sir. (R. 1598). (Emphasis ours).

It is petitioner's contention that to be held guilty of aiding and abetting the transportation of a stolen motor vehicle in interstate commerce that you must, at the time of the act of aiding and abetting, have the knowledge that the car has been

stolen or at least have the knowledge that one is to be stolen. That is, in order to convict petitioner of aiding and abetting in a Dyer Act violation that petitioner, at the time he delivered the car titles and other identification plates to Hinton, knew that a 1966 Pontiac was already stolen or that he knew that a 1966 Pontiac was to be stolen and that the serial plates and license plates he had furnished were to be attached to the stolen car. Hinton's testimony as heretofore set out conclusively proves that Smith lacked any guilty knowledge at the time he delivered the titles and identification plates to Hinton. Hinton's testimony further proves Smith not guilty of conspiracy since Hinton testified that he, Hinton, participated in the decision to transport stolen motor vehicles in interstate commerce, and that the decision to transport these stolen motor vehicles in interstate commerce was not made until after Hinton had made his deal with Smith.

Q: Mr. Hinton, is it a true statement that in November of 1966 it was decided that four stolen vehicles would be taken to Nevada and California for sale?

A: Yes, sir.

Q: Did you make that statement to Mr. Chapman, with the F.B.I.?

A: Yes, sir.

Q: Was it true when you made it?

A: Yes, sir.

Q: Is it true today?

A: Yes, sir.

Q: And that was your decision, wasn't it, Mr. Hinton?

A: Partly, yes, sir. (R.911). (Emphasis ours).

And at pages 919-920 of the Record, Hinton testifies:

Q: All right, sir. Now, you testified that when you first went to see Frank Smith, that you talked to him about getting the necessary papers, car titles, certificates, identification plates, or whatever was necessary to transport some cars to California, didn't you?

A: Yes, sir.

Q: And you testified specifically that you went to see him in October of 1966?

A: Yes, sir.

Q: As a matter of fact, you first said it was November, and then you changed your testimony, Mr. Hinton, and said no, no it was October when you first went to see Frank Smith, didn't you?

A: That's right.

Q: But right now you have reaffirmed in front of this jury that it was not until November of 1966 that it was decided to take stolen vehicles to Nevada and California?

A: That's right. (Emphasis ours). (R. 919-920).

Petitioner contends that because of Hinton's testimony, as heretofore set out, that the Government's own witness completely exculpated petitioner from any guilty knowledge of the conspiracy or of the Dyer Act aiding and abetting charge. However, if this Court will not go along with petitioner on this theory, then petitioner urges that Hinton's testimony is at least equally as consistent with Petitioner's innocence as it is with his guilt. Petitioner cites Dahly v. U.S., 50 F2d 37, 8 Cir. 1931, supra, on circumstantial evidence cases, at

page 42:

> "... where the evidence is as consistent with innocence as with guilt, no conviction can properly be had."

Further, petitioner argues that the circumstances relied upon to sustain his guilt are not inconsistent with every reasonable hypothesis of petitioner's innocence. La Conte v. U. S., 330 F2d 700, 701, 10 Cir., 1964, supra.

The Court of Appeals in its opinion holds that this is a circumstantial evidence case, and in so doing recognizes the necessity for the jury to draw inferences from facts proven by direct testimony. But the Court of Appeals has not recognized the inference on an inference rule and its opinion is thus in conflict with the opinions and pertinent holdings of this Supreme Court in U. S. v. Ross, 92 U. S. 281, 283-284 (1875); U. S. v. Falcone, 311 U.S. 205; Direct Sales Co. v. U. S., 319 U. S. 703, 711 (1943); and Ingram v. U. S., 360 U. S. 672, 79 S. Ct. 1314, 1320 (1959), as stated

in the Direct Sales Co. case, to wit:

> "Without the knowledge the intent cannot exist. * * * Furthermore, to establish the intent, the evidence must be clear, not equivocal. * * * This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning * * * a dragnet to draw in all substantive crimes." 319 U.S. at page 711. (Emphasis ours).

Further, the Court of Appeals opinion is in conflict with the holding of the Fourth Circuit Court of Appeals in U. S. v. Grow, 394 F2d 182, 4 Cir., 1968, which says at page 199:

> "...the only basis for finding that Grow caused the mailing is to draw an inference, seemingly wholly unsupported by evidence, * * * We think this instruction was without proper supporting evidence. An inference is a logical deduction or conclusion from an established fact. ' * * * charges of conspiracy are not to be made out by piling inference upon inference * * *' When the first or basic inference is impermissibly drawn it cannot thereafter serve to support other inferences upon which a subsequent finding is based. * * * We think it was error to allow the jury to consider whether Grow caused Applegate to mail the Count 3 letter and the accompanying brochure on April 9, 1960, two days before the brochures were sent even to the Idaho associations." (Emphasis ours). 394 F2d 182, 199.

In Direct Sales Company v U.S., 319 U.S. 703, this Court, construing its holding in Falcone, supra, said that Falcone held that:

> "...one does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, unless he knows of the conspiracy; and the inference of such knowledge cannot be drawn merely from knowledge the buyer will use the goods illegally. The Government did not contend, in those circumstances, as the opinion points out, that there was a conspiracy between the buyer and the seller alone. It conceded that on the evidence neither the act of supplying itself nor the other proof was of such a character as imported an agreement or concert of action between the buyer and the seller amounting to a conspiracy. This was true, notwithstanding some of the respondents could be taken to know their customers would use the purchased goods in illegal distillation."

The goods sold in Falcone were sugar, yeast or cans. There was some evidence of casual and unexplained meetings by the defendant's in Falcone with some of the illicit distillers, and there was some evidence of volume sales of the goods, but the opinion in Falcone held that such evidence of volume sales was too vague and inconclusive to establish knowledge and participation in the conspiracy. In Direct

Sales Company the goods sold were drugs restricted by Federal law in their sale. Direct Sales Company was selling to physicians, using a massive mail order advertising campaign holding out the bait of cut rate drugs, some of the physician purchasers were buying in obviously greatly excessive amounts from Direct Sales Company, and had been for a long time, as a result of the advertising and cut prices. The physicians were reselling the drugs to other persons in a manner which violated the Federal laws, and by virtue of which the Government charged that Direct Sales Company must have known of the physicians illegal useages and purposes for the drugs. In holding that this evidence was sufficient to convict Direct Sales Company of conspiracy to violate the Federal drug laws, this Court distinguished this fact situation from that in Falcone, said at page 711-713:

> "The difference between sugar, cans, and other articles of normal trade, on the one hand, and narcotic drugs, machine guns and such restricted commodities, on the

other, arising from the latter's inherent capacity for harm and from the very fact they are restricted, makes a difference in the quantity of proof required to show knowledge that the buyer will utilize the article unlawfully. Additional facts, such as quantity sales, high-pressure sales methods, abnormal increases in the size of the buyer's purchases, etc., which would be wholly innocuous or not more than ground for suspicion in relation to unrestricted goods, may furnish conclusive evidence, in respect to restricted articles, that the seller knows the buyer has an illegal object and enterprise. Knowledge, equivocal and uncertain as to one, becomes sure as to the other. So far as knowledge is the foundation of intent, the latter thereby also becomes the more secure.

"The difference in the commodities has a further bearing upon the existance and the proof of intent. There may be circumstances in which the evidence of knowledge is clear, yet the further step of finding the required intent cannot be taken. Concededly, not every instance of sale of restricted goods, harmful as are opiate, in which the seller knows the buyer intends to use them unlawfully, will support a charge of conspiracy." * * * "... Footnote 8: This may be true, for instance, of single or casual transactions, not amounting to a course of business, regular, sustained and prolonged, and involving nothing more on the seller's part than indifference to the buyer's illegal purpose and passive acquiesance in his desire to purchase, for whatever end. A considerable degree of carelessness coupled with casual transactions is tolerable outside the boundary of conspiracy.

> There may be also a fairly broad latitude of immunity for a more continuous course of sales, made either with strong suspicion of the buyer's wrongful use or with knowledge but without stimulation or active incitement to purchase." 319 U.S. at pages 711-713.

Referring back to the facts in Direct Sales Company, this Court said at page 713:

> "When the evidence discloses such a system, working in prolonged operation with a physician's unlawful purpose to supply him with his stock in trade for his illicit enterprise, there is no legal obstacle to finding that the supplier not only knows and acquiesces, but, joins both mind and hand with him to make the accomplishment possible. The step from knowledge to intent and agreement may be taken. There is more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern. There is informed and interested cooperation, stimulation, instigation." 319 U.S. at page 713.

Petitioner contends that the evidence shows that he had no knowledge of any illegal usage Hinton planned for the titles, serial plates and license plates, but assuming, arguendo, that petitioner knew or suspected that Hinton was going to use them for some illegal purpose; surely the sound and just reasoning of this Court in both Falcone

and Direct Sales Company would not allow for a conviction of this petitioner for the conspiracy charged in petitioner's indictment, under the evidence produced by the Government. The opinion by the Court of Appeals, in holding that petitioner had knowledge of and knowingly participated in the conspiracy as charged is in direct conflict with the Fourth Circuit's holding in U. S. v. Grow, supra, with this Court's opinion and pertinent holdings in Ingram, Falcone and Direct Sales Company, supra, and so enlarges on the laws and unfounded permissiveness of conspiracy convictions that it sets a dangerous precedent to the fair and impartial administration of Federal justice, has denied this petitioner a fair and impartial trial, and if allowed to go unchecked will make it dangerous to engage in any legitimate business in these United States, particularly the selling of cars.

In petitioner's case, the Court of Appeals

held that "There appears to be no direct evidence that Smith knew the cars were stolen, but there is ample evidence from which the jury could have inferred that he had such information." (Emphasis ours). In order to reach such a finding by inference, petitioner's jury was forced to pile inference on inference which is not permitted, according to the holdings of this Court and the Court of Appeals' holdings last cited. Included among the inferences the jury would have to make in order to legally find petitioner guilty are the following:

(1) That Hinton's testimony concerning a Frank Smith or a Mr. Smith did not refer to the witness, Frank Smith, Jr.

(2) That Hinton's testimony concerning a Frank Smith or a Mr. Smith did refer to petitioner.

(3) That Hinton's testimony concerning the alleged telephone call from a Frank Smith which reached Hinton in Long Beach, California, while

Hinton was in interstate transportation of stolen automobiles, and wherein a Frank Smith is alleged to have informed Hinton that he was about to be caught; that this testimony did not refer to Frank Smith, Jr.

(4) That Hinton's testimony concerning the alleged telephone call from a Frank Smith which reached Hinton in Long Beach, California, while Hinton was in interstate transportation of stolen automobiles, and wherein a Frank Smith is alleged to have informed Hinton that he was about to be caught; that this testimony did refer to petitioner.

(5) That said alleged telephone call to Hinton meant that petitioner had knowledge of stolen cars, the alleged conspiracy, and the alleged transportation of stolen cars in interstate commerce.

(6) That said alleged telephone call to Hinton in Long Beach, California, was not a result of knowledge of the conspiracy and the alleged

Dyer Act crime, first learned by petitioner at a time after the convoy of stolen cars had left Austin, after petitioner had innocently completed aiding, abetting, inducing, counseling or procuring the crimes alleged in the indictment.

(7) That at the time of the alleged sale and delivery of the certificates of title, the license and serial plates to Hinton that petitioner had knowledge that said objects would be used by Hinton to disguise stolen cars.

(8) That petitioner had knowledge of the planned interstate transportation of the cars prior to or contemporaneously with the alleged sale to Hinton of these objects, and that petitioner further had knowledge of the conspiracy alleged in the indictment prior to or contemporaneously with the alleged sale and delivery of the serial plates, license plates and certificates of title to Hinton.

(9) That petitioner had the intent to

participate in the conspiracy and the Dyer Act violation alleged in the indictment.

(10) That petitioner intended to and did aid, abet, counsel, induce or procure the commission of the Dyer Act violation alleged in the indictment.

(11) That petitioner intended to and did wilfully aid, abet, counsel, induce or procure the formation of or effectuate the objects of the conspiracy as alleged in the indictment.

(12) That petitioner was not under the impression that Hinton was buying the wrecked cars as well as the certificates of title, serial plates and license plates, and that Hinton intended to send for same or get possession of them himself later.

(13) That petitioner was under the impression that he was selling Hinton only the certificates of title, the serial plates and the license plates.

(14) That petitioner learned about the alleged conspiracy and the alleged planned Dyer Act violation from someone other than Hinton, and that petitioner obtained this information at a time prior to or contemporaneously with his alleged delivery of the vehicle identification plates and the certificates of title to Hinton.

(15) That petitioner would have become suspicious of Hinton's motives when Hinton proposed paying petitioner after Hinton had taken the wrecked cars to the West Coast and sold them, that this was a definitely unusual business arrangement for Smith that he wouldn't have entered into if he didn't know or suspect that Hinton was going to use the vehicle identification plates and certificates on stolen cars, and that petitioner desired to do so.

(16) That petitioner would have or could have reasonably understood Hinton's full conversation with petitioner as meaning that Hinton

was purchasing the wrecked cars and their identification plates and certificates of titles for the purpose of affixing the identification plates to stolen cars that would be moved in interstate commerce. Hinton's full conversation with petitioner being:

> "Well, I told him we were going to take the cars on the West Coast and sell them, and when I got back, well, I would give him what I owed him."

1 Wigmore On Evidence, 3rd Ed., Sec. 41, pages 418-440, cites Justice Lockwood's opinion in New York Life Ins. Co. v. McNeely, 79 Pac. 2d 948 (1938), as being a "well-reasoned" opinion on the question of inferences.

Wigmore, at page 438, quotes Justice Lockwood as follows:

> "The proof of an ultimate fact may be made in two manners, the one by direct or, as it is sometimes called, testimonial evidence, and the other by indirect or, as it is frequently denominated, circumstantial evidence. But it is the rule of law that while a conclusion as to an ultimate fact may be based upon an inference from circumstantial evidence, in reaching such

conclusion the inference as to the ultimate fact may not be based on an inference as to the existance of the circumstantial facts.

"This rule has been stated in the case of United States v. Ross, 92 U.S. 281. * * * The Court's, however, have always insisted that the life, liberty and property of a citizen should not be taken away on possibilities, conjectures, or even, generally speaking, a bare probability. In criminal cases, they demand that when a conviction is to be based on a chain of inferences, each and every link in that chain must exclude every other reasonable hypothesis. In civil cases, involving only property rights, the rule is not so strict, and it is sufficient, if the ultimate fact is to be determined by an inference from facts which are established by direct evidence, that it be more probable than any other inference which could be drawn from the facts thus proven. But when an inference of the probability of the ultimate fact must be drawn from facts whose existance is itself based only on an inference or a chain of inferences, it will be found that the Courts have, with very few exceptions, held in substance, although usually not in terms, that all prior links in the chain of inferences must be shown with the same certainty as is required in criminal cases, in order to support a final inference of the probability of the ultimate fact in issue. We think that this is the true meaning of the 'inference upon inference' rule in civil cases and it is borne out by a careful analysis of the majority of cases in which it has been applied, and that the

courts do not mean that under no circumstances may an inference be drawn from an inference, but rather that the prior inferences must be established to the exclusion of any other reasonable theory rather than merely by a probability, in order that the last inference of the probability of the ultimate fact may be based thereon. This rule is not based on an application of the exact rules of logic, but upon the pragmatic principle that a certain quantum of proof is arbitrarily required when the courts are asked to take away life, liberty, or property.

"* * * While it is permissible to draw successive inferences, each inference except the last one, in order to be used as a link in a chain of inferences, must be established to the exclusion of any other reasonable theory, rather than merely by a probability." (Emphasis ours).

Petitionerer contends that his case never gets beyond the first inference because his identity as being the person to whom Hinton's testimony was referring was not established to the exclusion of any other reasonable theory. It is a reasonable theory, under the facts and circumstances, that Hinton's testimony could have been referring to Frank Smith, Jr., as easily as it could have been referring to petitioner. The most that could be said from the Government's point of view is that

there was established a probability or suspicion that Hinton's testimony referred to petitioner. Petitioner contends that not even a probability was established. But even if it was, the conviction should not be allowed to stand under this impermissible inference, which could have established no more than a probability or suspicion that petitioner was the person referred to in Hinton's testimony.

The Court of Appeals, in its opinion holds that "once it is shown that a defendant knew stolen cars were involved, the government need not show that he knew they moved in interstate commerce to support a Dyer Act or conspiracy conviction." This holding, in so far as the conspiracy conviction is concerned, is directly in conflict with the opinions and pertinent holdings in Davidson v. U. S., 61 F2d 250, 254-255 (8 Cir. 1932); Linde v. U. S., 13 F2d 59 (8 Cir.); and Dickerson v. United States,

18 F2d 887, 8 Cir. The Seventh Circuit Court of Appeals, in Loftus v. U. S., 46 F2d 841, a conspiracy case, cited as authority by the Court of Appeals in petitioner's case, said at page 847:

> "In order to support a conviction, it was not necessary for the government to prove that appellant knew that such cars were a part of interstate commerce."

But in Dickerson, supra, the Eighth Circuit Court of Appeals said:

> "To warrant a conviction for conspiracy to violate a criminal statute, the evidence must disclose something further than participating in the offense which is the object of the conspiracy; there must be proof of the unlawful agreement, either express or implied, and participation with knowledge of the agreement." (Emphasis ours) 18 F2d 887, at page 893.

As Richard Hinton's testimony applies to Count IV of the indictment, particular attention should be paid to the trial judge's clear and unequivocal instruction to the jury while the witness, Hinton, was testifying:

> THE COURT: "...The jury is instructed in connection with the testimony, all this

> testimony is evidence, if it is evidence against FRANK SMITH, only insofar as it goes to show, if it does show, his guilt or innocence as being part of this conspiracy that is related in the indictment." (R. 777).

If this instruction, which was never withdrawn or diluted, precluded the jury from considering any of Hinton's testimony, given either before or after the instruction, in arriving at their verdict as to Petitioner on Count IV of the indictment, the aiding and abetting count (which is the position petitioner takes); then, assuming the jury abided by this instruction from the Court, which petitioner asserts that the jury was bound to do, there is absolutely no evidence left in the record to connect this petioner with the charges against him in Count IV; other than the name Frank Smith being in the chain of car titles on one of the two 1966 Pontiacs involved in the evidence in Count IV. Petitioner respectfully insists that as to him this instruction cleansed all of Hinton's

testimony from Count IV. But beyond any question, it precluded the jury from considering Hinton's testimony that Charles Garner told Hinton he got the papers for the Catalina Pontiac from Frank Smith. In Nye & Nissen v. U. S., 168 F2d 846, 854 (9 Cir., 1948), the Court said:

> "It is true that the jury must follow the rules of law given by the trial judge. Caroll v. U. S., 2 Cir., 16 F2d 951, cert. den. 273 U.S. 763."

Since the jury found petitioner guilty on Count IV, it is obvious that they either disobeyed the instructions of the trial judge, or they found petitioner guilty on general principals.

The Court of Appeals said that under the rule in Glasser v. U. S., 315 U.S. 60, 80 (1914) that it could not set aside the jury's verdict because it is based on substantial evidence. But petitioner contends that Glasser also stands for the alternate proposition as well; that is, that where there is not substantial evidence of

guilt in the record that the verdict of the jury must be set aside. The opinion of the Court of Appeals, affirming petitioner's convictions, is in direct conflict with the opinion and pertinent holding of this Court in Glasser, supra, and in conflict with the opinion and pertinent holding of this Court in N.L.R.B. v. Columbian Co., 306 U.S. 292 (1930). In N.L.R.B. v. Columbian, this Court held that substantial evidence is "* * * such relevant evidence as a reasonable mind might accept as adequate to support a conclusion * * *" 306 U.S. 292 at page 300.

The Court of Appeals not only said the verdict was based on sufficient substantial evidence but that it was based upon sufficient credible evidence. With all due respect to the Court of Appeals, it is beyond petitioner how Hinton's testimony could ever be called either substantial or credible. The Court of Appeals, in its opinion said:

> "It is apparent that Hinton's testimony was often confusing and occasionally difficult to follow, but the record reveals no glaring inconsistencies or contradictions. The major discrepency seems to be Hinton's testimony that Smith supplied identification for three of the stolen vehicles while at earlier grand jury proceedings and in an interview with FBI Agent Chapman, he had testified that only two of the essential papers came from Smith."

Among the inçonsistencies which saturate Hinton's testimony petitioner would not assign the one picked out in the Court of Appeals opinion as having anywhere near the polish and class of its many brethren. Hinton is either a perjuror, a pathological liar, or too mentally ill and confused to be a competent witness. The evidence shows that Hinton was a heroin addict during the period of time of the alleged conspiracy, and his testimony at the trial indicates that some damage to his mind has ensued, either from the heroin or from some other cause unknown. But something is wrong with him and petitioner, at the outset of the trial, before Hinton

testified, moved the Court to order Hinton examined by competent psychiatric and other medical experts to determine his competency as a witness, which petitioner challenged. This was denied. Petitioner has assigned this denial of his motion as error which substantially prejudiced this petitioner, and denied him a fair trial.

When Hinton testified at Petitioner's trial, his mind was definitely confused as to events that took place between July of 1966 through November of 1966 and on for some several months thereafter. October and November of 1966 are the months of the alleged conspiracy. Events would seem to come and go, in and out of his mind as he sat there on the witness stand as the government's key witness testifying this petitioner into the penitentiary. He obviously had blanks in his memory or his comprehension was either so blurred as to events and conversations during October and November of 1966 and

on up to the day he was sitting on the witness stand in petitioner's trial, that he was unable to testify with any certainty but would answer in a nebulous and hazy manner. He would remember an event one way, then a few pages later in the record either not remember it at all or remember it in a completely different way, his memory going back and forth like a ping pong ball. His testimony as it appears chronologically in the record as to when he took his first shot of heroin is an example of the tricks his memory was playing on him as he testified against petitioner. Hinton testified that he took his first shot of heroin: in November, 1966 (R. 996); in January, 1967 (R.997-998); on Thanksgiving day, 1966. (R 999); on July 4, 1966. (R. 1001). Considering the extreme involvement Hinton had with heroin during October and November of 1966, it is no wonder that his recollection of conversations and events is

blurred, confused, and full of holes that he attempted to patch with fabrications. The testimony of Louis Del Branton, one of the alleged co-conspirators, is enlightening on the extent of Hinton's involvement and abject heroin sickness during October and November of 1966, to-wit:

> BRANTON: He started taking heroin after we returned from California or the West Coast; as far as I know, the first time he took heroin was after we returned and he took an overdose or got nearly an overdose, and I walked him for about two hours down on Sabine Street; and after that, of course, I understand he got a good habit, because he got picked up in Dallas, and he come to my house and was real sick and--- * * * At one time he came to my house and told me that he had the dope habit, as the word goes, and that he was trying to kick it, you know, said he was real sick, that they had had him locked up in Dallas for five days and he was real sick, and said he was going to try to to admit himself to the State hospital for help..." (R. 1576-1577).

Hinton's comprehension of important events that had happened to him even after his arrest in February of 1967, was so bad while he was

testifying against petitioner that when asked if it was true that he had not been charged with burglarizing the Jarrel Bank, even though he was guilty of it and had testified as a government witness at the trial, Hinton replied:

HINTON: Mister, I don't know what I am charged with.

Hinton was arrested in February of 1967 and had been in jail thereafter up to and including the trial of petitioner. Shortly after Hinton was placed in jail in February of 1967, he made a lengthy statement to FBI agent Chapman after several lengthy interviews. The record shows that agent Chapman set out in his typewritten report of these interviews that Hinton told him that he owed Frank Smith $400.00 as his part. Hinton testified at petitioner's trial that he was supposed to split the money and give Mr. Smith $2,000.00. At the trial, Hinton testified that he didn't pay co-defendants Garner and Woods

a penny after he got back from Las Vegas. Whereas, FBI agent Chapman's report shows that Hinton told Chapman that he paid Garner and Woods $3,000.00 as their part of the proceeds from the sales of the stolen cars. Hinton told Chapman that he paid Garner this $3,000.00 because he made "...available the stolen license plates, serial plates, and titles to two of the stolen cars..." At the trial Hinton testified to the contrary that Garner was supposed to get half of the proceeds of the sales of the stolen cars because Garner knew how to fill out the car title papers involved and performed this service in anticipation of getting half the proceeds. The most glaring of Hinton's inconsistencies, however, related to the alleged telephone call Hinton claimed that Frank Smith made to him while Hinton was in Long Beach, California, with the stolen cars, allegedly warning Hinton that Hinton was just about to get caught. The fact

that this telephone call testimony is such an obvious lie can be borne out no better than by the opinion of the Court of Appeals which refers to the call as the "alleged" call. What makes the telephone call testimony the champion inconsistency among all Hinton's so called inconsistencies is the fact that Hinton did not tell FBI agent Chapman about it, did not tell the Del Rio Grand Jury about it three or four weeks later, and in fact first added it to his bag of tricks he was performing for the government, during his testimony at petitioner's trial. Among the factors that make it so incredible and patently false, obviously concocted within Hinton's sick mind in an effort to do something he thought would please the prosecutors, is the fact that after he supposedly received this desperate warning that he was just about to be caught that he continued placidly on in the convoy of stolen cars, driving from Long Beach, California,

to Las Vegas, Nevada, where he and the others registered in their own names at the Star Dust Motel, a famous hostelry whose location is well known to the police, and stayed there for about seven more days openly and busily engaged in marketing their stolen cars to legitimate car dealers there. Hardly the actions of a man who had just been warned of his imminent arrest.

Under these circumstances, this Court well knows just as the Court of Appeals tacitly recognized by referring to the telephone call as the alleged call, that Hinton's testimony about the telephone call from a Frank Smith is for a certainty, a lie. Yet, it is the most dangerous piece of evidence in the record to this petitioner, since the Court of Appeals and this Court under the rule in Glasser, and a long line of cases, must take the substantial evidence in the light most favorable to the government, and thus accept something as true which both the

the Court of Appeals and this Court must know for a certainty, in the light of human experience, is false. It is incredible testimony. It is false testimony. And if this Court holds that petitioner was sufficiently identified as the Frank Smith and the Mr. Smith of Hinton's testimony, and that the telephone call testimony is substantial, credible evidence, that Hinton is competent, and that his testimony otherwise tended to incriminate Smith, then we are in trouble. And that is an unfortunate thing, for Smith would be hung on a rule that makes something true that is false. And spend five years in his cell wondering how he got there when the government's own witness testified that he did not tell petitioner about any stolen cars.

This is not a case where a witness held back something from the F.B.I. and the grand jury. Hinton was turning cartwheels to cooperate

with these investigative agencies. The truth is that he simply hadn't had time to finish the cage he was building around Frank Smith. When he talked to the FBI and the Grand Jury, he hadn't as yet devised this part of his fabrication against Smith. In Hinton's pitiful and sinister attempt to curry favor with the Government and its help in obtaining leniency and the diminishment of punishment he would have to suffer for the many crimes he testified he has committed, in his fear-ridded hope that if his testimony obtained convictions against this petitioner that the Government would reward him by not indicting and prosecuting him for his many crimes they were holding over his head--this dreg of humanity, dope-drained and trapped, lay in his cell and slowly wove the web of fabricated testimony that he hoped would convict Frank Smith and thus delimit the length of penal servitude of Richard Hinton. The telephone call testimony was

the icing on the cake, Hinton's coup de grace that would bring him his reward in the Department of Justice if not in Heaven. See (R. 832, 854) setting out the crimes Hinton had been convicted of and the long and lethal list of crimes the Government keeps hanging over Hinton's head.

The record not only demonstrates that Hinton had difficulty remembering events of a few months past. It ably demonstrates that he couldn't remember from minute to minute what he had just testified to. Example:

> QUESTION: Now, you have testified here about telephone calls Frank Smith made to you and that you made to him while you were on this trip to Nevada and Las Vegas. Now did you tell Mr. Chapman about that?
>
> HINTON: I don't remember if I told him or not. (R. 820).

Seven pages later in the record, without any further reference to the telephone calls, Hinton suddenly and unexplicably testified:

> QUESTION: Now, did you tell Mr. Chapman that Frank Smith called you out in Las Vegas or California, wherever it was you

claim he called you?

HINTON: I did.

QUESTION: And did you tell Mr. Chapman that you called Mr. Smith back at Mr. Stelfox's place here in Austin?

HINTON: Yes, sir. (R. 827)

The stolen car described in Count IV of the indictment is a "1966 Pontiac", petitioner's motion for bill of particulars seeking further description was denied. The evidence showed that two 1966 Pontiacs were transported in interstate commerce by Hinton and his traveling companions. One of these Pontiacs was a Catalina, the other was a Bonneville. Hinton testified that Garner told him that Garner got the papers for the Catalina from Frank Smith. But immediately prior to this testimony the trial judge had instructed the jury that they couldn't consider Hinton's testimony except as to the conspiracy count in so far as it applied to the guilt or innocence of Frank Smith. (R. 777)

This is the only testimony that in anywise connects this petitioner to the Catalina Pontiac, and the jury was instructed that they consider it as to Frank Smith. (R. 777). The Catalina Pontiac is the vehicle that both Hinton and Branton testified that Branton drove across the Texas line. Hinton testified that he only owed Frank Smith for the Volkswagen, the Bonneville and the Chevrolet, not any other car; that he didn't owe anybody for the certificate of title, vehicle identification plate and license plates for the '66 Catalina; that he didn't pay anybody for them; that he got the title for the Catalina from Charles Garner. (R. 805-808)

Hinton testified that the defendant Gurlesky stole the Catalina Pontiac, and that he, Hinton, sold it to a kinsman of his, Fred Calvert, bought it back from Fred Calvert, who lived in Austin, Texas, because he was afraid Calvert would get caught with a stolen car, and

that when he bought it back he, Hinton, decided to add it to the convoy of stolen cars he was planning to take to the West Coast. Hinton's testimony shows conclusively that the stolen 1966 Catalina Pontiac automobile was his, insofar as a thief can own a stolen car, that his taking the Catalina to the West Coast with the other stolen cars was completely independent of any connection with Frank Smith. See (R. 861-867, 865, 878-882, 886-889, 981-982, 1016). At (R. 865): Hinton: "The Catalina came before the other three did; the Catalina, before we were ever thinking about going to the West Coast."

Branton testifies that he never drove the Bonneville Pontiac on the trip from Austin, Texas, to Las Vegas, Nevada; that he drove the Catalina all the way. This is disputed by Hinton who testified that Branton drove the Catalina across the Texas State line, and then, either in New Mexico or Arizona, swapped cars with the defendant,

Dorothy Villa-Franca, and drove the Bonneville Pontiac the rest of the way to Las Vegas, Nevada. Surely the Government would have to prove that Branton at least started out in the Western District of Texas in the Bonneville and at least drove it across the Texas state line in order to sustain a conviction as to this petitioner as to the Bonneville.

In any event, the proof viewed in the best light for the Government, shows that Branton drove two 1966 Pontiacs across State lines, and there is no way of knowihg which Pontiac the jury convicted this petitioner on. If it was the Catalina, then the Government totally failed in its burden of proof. Further, Hinton's testimony concerns two vehicles he refers to over and over as a "SIXTY-SIX CATALINA," a "SIXTY-SIX BONNEVILLE," or a "SIXTY-SIX PONTIAC." It is difficult, if not impossible, to find a reference to a 1966 Catalina Pontiac or a

1966 Bonneville Pontiac or a 1966 Pontiac. James Alford Boyd's testimony in no wise even touches on a 1966 Pontiac. Where is the proof that petitioner Smith had any knowledge whatsoever of the existence of a 1966 Pontiac Catalina or that one had been stolen? Or that a stolen 1966 Pontiac Catalina was to be transported across a state line? Or that a stolen 1966 Pontiac Bonneville was to be transported across a state line? There is none.

Petitioner testified at the trial. Petitioner denied having any knowledge of any stolen cars or conspiracy to transport stolen cars in interstate commerce, denied Hinton's testimony as to petitioner completely, denied all of the charges against him in the indictment, and specifically denied calling Hinton in California and warning Hinton he was going to get caught and to get rid of the cars and the drivers. (1621-1624, 1649)

Hinton testified that when he purchased the certificates of title, the license plates

and the serial identification plates to the 1966 Chevrolet, the 1966 Pontiac Bonneville, and the 1966 Volkswagen, that Frank Smith handed these items over to Hinton personally in Smith's office. (R. 1596-1598).

Petitioner testified that a stranger to petitioner, identifying himself as one Don Duryea, a used car dealer from Houston, Texas, came to petitioner's place of business sometime in late October of 1966 or early November of 1966, stating that he was interested in buying some late model wrecked cars to use for rebuilding purposes. Petitioner testified that Duryea ended up selecting three cars, a 1966 Volkswagen, a 1966 Pontiac, and a 1966 Chevrolet. Petitioner says that he and Duryea arrived at a price, that he filled out the titles and that then Duryea attempted to pay petitioner with a counter check on a Houston, Texas, bank. Petitioner testified he told Duryea he would accept the check if he

telephoned the bank in Houston and was informed that it was good. At this point petitioner testified that Duryea told him the check was not good now but would be good by the time it reached Houston. Petitioner informed Duryea that in that case he would have to have cash before he could sell the cars to Duryea. Duryea then paid petitioner cash for the Volkswagen, was given the title papers of that vehicle, and then told petitioner he would be back in a day or two with the money for the Pontiac and the Chevrolet. Petitioner says he put the titles and licenses to the Pontiac and Chevrolet in his desk drawer to await the return of Duryea. A wrecker came and got the Volkswagen car. Several days later petitioner discovered that the titles to the Pontiac and the Chevrolet had disappeared but that Duryea had never returned for these two cars. Also, he discovered that the serial plates were missing from the Pontiac and the

Chevrolet. Petitioner reported this theft to Homer Hamby of the Texas Highway Department, the proper officer to whom such things should be reported, and such was confirmed at the trial by Homer Hamby. (R. 1611-1619, 1630-1634, 1653-1654).

Another witness was present in petitioner's office when the above transaction with Don Duryea took place, and testified at the trial and confirmed petitioner's testimony about this Duryea transaction, this witness having been introduced to Duryea and having overheard the conversation. Said witness, a totally disinterested witness, was Mr. Henry Fletcher of Lockhart, Texas, who had just retired from six years of service in the Texas House of Representatives. See Henry Fletcher's testimony (R. 1666-1674). Rudolph Robinson, an employee of petitioner's, testified that a Don Duryea had come to petitioner's place of business and attempted to buy those

three cars and had succeeded in buying only the Volkswagen. (R. 1675-1678). Frank H. Smith, Jr., also confirmed it. (R. 1658-1663).

Another witness for petitioner, Mr. Jack Dillard, an ex-F.B.I. Agent, who had been Executive Assistant to former Governor of Texas, Allan Shivers, who is now a consultant for Baylor University in fields of development and public relations, and a long-time friend of petitioner, testified that he was present at petitioner's place of business when petitioner cooperated in every extent with law enforcement officers investigating this case, by freely and voluntarily turning over all his records to such officers. (R. 1681-1684).

As to James Boyd's testimony, the Government had him testifying to incriminating conversations with Frank Smith that Boyd said occurred at least a year before the crime alleged in the indictment is supposed to have occurred. And

Boyd testified to buying certificates of title, serial plates and license plates from Smith during a short period of time in 1965, and said that Smith knew he was going to put them on stolen cars, which petitioner denied. Then the Government introduced in evidence a deposition taken in a civil case several months after Boyd testified he had stopped doing business with Appellant Smith. This deposition was Boyd's deposition taken when this petitioner sued him for money owed to Smith on the cars Boyd had purchased from him.

Boyd told a different story on his deposition than he testified to at petitioner's trial concerning the same matter. The story Boyd told at the trial would incriminate this petitioner; the facts he related at his deposition would not. Which story is the Government bound by? It introduced the deposition which tended to impeach its own witness, showed Boyd was perjuring

himself, either during his deposition or at petitioner's trial. Is the Government bound by one or both of Boyd's stories? See the introduction of Boyd's deposition into evidence (R. 1520, 1527-1536). Of course, it is this petitioner's contention that nothing the witness Boyd testified to as relating to this petitioner could be considered as bearing on the conspiracy alleged against petitioner in Count I, which the Government charged began in November of 1966, almost a year after Boyd's dealings with this petitioner allegedly occurred and ended by Boyd's own testimony.

Petitioner testified that he had sold wrecked cars to the witness, James Alford Boyd, that he had never sold him just title papers, serial plates and license plates, and that Boyd had never told him anything about any stolen cars or that he had any intention of using Frank Smith car titles, serial plates and license

plates on stolen cars.

In conclusion to this argument on insufficiency of the evidence, petitioner again recalls to the Court's attention that at the time Hinton swears he made his alleged deal with petitioner, Frank Smith (mid October, 1966), to obtain the three sets of car titles, serial plates and license plates, Hinton further swears that no conspiracy had been entered into, that is, no decision, no agreement, no conspiracy, if you will, had been made and entered into, to transport stolen motor vehicles in interstate commerce. This decision according to Hinton was not made until November, 1966. (R. 1911). If this is true, then surely petitioner cannot be part of an alleged conspiracy that was not hatched until a couple of weeks after Hinton's alleged dealings with Smith were over and done. (R. 919-920)

REASON TWO

The following reasons for granting the writ relate to question one, question two, and question _____ heretofore set out in this petition for certiorari. The basis for error raised in all three questions arises out of the constitutional guarantee that no one shall be tried except by an indictment brought by a grand jury. Thus, the rule has long been established that an indictment will not be amended by any other person or entity except the grand jury. It is petitioner's contention that the trial judge amended the indictment in this case in three separate instances and manners.

The trial judge first amended the indictment by granting the government's motion to dismiss Counts Two and Five of the indictment. After the government rested, and while the trial judge had petitioner's motion for judgment of acquital under consideration, the government prosecutor interrupted the proceedings and moved the court to strike Counts Two and

Five of the indictment. This motion was granted. Petitioner did not object to the granting of this motion, nor did petitioner join the government in this motion. After Counts Two and Five were dismissed from the indictment, the court denied petitioner's motion for judgment of acquittal. Said motion for acquittal was addressed to all counts of the indictment. Later, while charging the jury, the trial judge (R. 1914-1915) instructed the jury that he had dismissed Counts Two and Five from the indictment, and that the jury should not consider Counts Two and Five "for any purpose." Petitioner contends that the dismissal of Counts Two and Five from the indictment and the court's instruction to the jury not to consider such counts for any purpose, amounted to an amendment of Count One of the indictment, the conspiracy count, in that such action by the trial

court struck and deleted two overt acts as charged by the grand jury in Count One. This resulted because Counts Two and Five of the indictment are also contained in Count One as separate and distinct overt acts. See page two of the indictment.

"In furtherance of the conspiracy, and to accomplish its purposes, the following overt acts were committed:

1. The acts described in subsequent counts of this indictment."

Petitioner contends that an overt act as contained in an indictment for conspiracy is not mere surplusage, but must be considered, and is, a matter of substance, that can only be deleted from the indictment by action of the grand jury. It follows, therefore, that after the trial judge dismissed Counts Two and Five of the indictment, Count One was no longer an indictment by a grand jury. For this reason, petitioner's conviction on Count One cannot stand.

Petitioner sustained additional prejudice by the trial court's act of deleting these two overt acts from Count One, by virtue of the fact that any future indictment against this petitioner for conspiracy to commit the offense against the United States as described in Counts Two and Five of this indictment, would not be subject to a plea and bar or a plea of prior conviction based on double jeopardy, because the substantive Dyer Act offenses, as described in Counts Two and Five of this indictment, were removed from the confines of the conspiracy, as alleged in Count One of the indictment in this case, on which petitioner has been convicted.

It has long been established that without the allegation of at least one overt act, an indictment would be insufficient. Further, in order to uphold a conviction for conspiracy, at least one overt act must be supported by substantial evidence. Since the grand jury cannot anticipate what proof, if any, will be admitted into evidence at the trial of the

accused, it has become the practice of grand jury, to charge multiple overt acts when they indict for conspiracy. At the time the grand jury returns the indictment, therefore, each overt act contained among multiple overt acts, is essential to the indictment; therefore, each overt act contained among multiple overt acts, is essential to the indictment, and is a matter of substance. A matter of surplusage in an indictment would be subject to a motion to strike from both the government as well as the accused. It is essential to the government case to prove the commission of at least one overt act during the period of the conspiracy, and to prove it beyond a reasonable doubt. The government, therefore, has the right to have each and every overt act as charged in the indictment, submitted to the jury for its consideration.

The landmark case in this area of the law that prohibits anyone except the grand jury from amending an indictment is Ex Parte Bain, 121 U.S. 1, 10, 30

L. Ed. 849 (1887). In Ex Parte Bain this court stated:

> "If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed."

It is petitioner's contention that if an indictment for conspiracy sets out more than one overt act, that each and every overt act becomes a charging part of the indictment.

The rule in Bain has continued to be followed by this court in its opinion and holding in Stirone v. United States, 80 S. Ct. 270, 361 U. S. 212, 4 L. Ed. 2d 252 (1960). The holding of the Court of Appeals in petitioner's case is in direct conflict with Bain and Stirone.

The trial judge also amended the grand jury's indictment by charging petitioner with the crime of conspiracy to defraud the United States. This amendment of the indictment was accomplished by way of the trial judge's instructions to the jury in response to their first request for additional instructions on conspiracy. The trial judge, in responding to the jury's question, led the jury to believe that petitioner was on trial for defrauding the United States. Whereas, the indictment of the grand jury charged only a conspiracy to commit the offense of transporting motor vehicles in interstate commerce.

At page 1941 of the record, the trial judge instructed the jury:

> "Now, in connection with that definition, you are instructed that the reference of the conspiracy to commit or defraud the United States as defined in 371 in this case now on trial, being--is a felony, and it lies under Article 2312 of Title 18, ...."

It is petitioner's contention that this instruction to the jury amended the grand jury's indictment

and expanded the area of crime within which they could find petitioner guilty. The trial judge's entire instructions relating to the crime of defrauding the United States are as follows, to-wit:

> JUDGE'S INSTRUCTIONS TO THE JURY: "Title 18 of the United States Code, Section 371, reads as follows: 'If two or more persons conspire to commit any offense against the United States, or any agency thereof, in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00, or imprisoned not more than five years, or both. If, however, the offense the commission of which is the object of the conspiracy is a misdemeanor only, punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.' That is Section 371 of Title 18. Now, in connection with that definition, you are instructed that the reference of the conspiracy to commit or defraud the United States, as defined in 371 in this case now on trial, being--is a felony, and it lies under Article 2312 of Title 18, *** Now, this indictment is for conspiracy. 371 provides, as I have already read to you, has to do with the conspiracy to commit an offense or to defraud the United States."

In failing to reverse petitioner's conviction for conspiracy on the basis of these instructions, the Court of Appeals' opinion is in direct conflict with the holdings of this court in ExParte Bain, supra,

and in Stirone v. United States, supra, as well as being in conflict with the opinion of the Court of Appeals for the 3rd Circuit in United States v. Roach, 321 F2d 1 (1963).

The third instance where the trial judge amended the indictment of the grand jury and enlarged upon the area in which the jury could attach guilt to petitioner occurred when the judge instructed the jury that they could find petitioner guilty on Count Four of the indictment if they found that petitioner had willfully caused the transportation of a stolen 1966 Pontiac in interstate commerce. The grand jury's indictment charged that petitioner "... aided, abetted, counseled, induced and procured the commission of the ..." offense described in Count Four of the indictment, a substantive Dyer Act charge. Willfully caused is left out of the indictment.

The offending willfully caused instruction to the jury as it related to petitioner's guilt or innocence under Count Four of the indictment occurred

when the trial judge instructed the jury, to-wit: "Whoever willfully causes an act to be done which, if directly performed by him or another would be an offense against the United States, is punishable as a principal. Every person who thus willfully participates in the commission of a crime may be found to be guilty of that offense." (R. 1924) The court further instructed the jury as to willfully caused, as follows, to-wit:

> "The Federal Law which defines the responsibility for criminal acts, regardless of the degree or extent of participation, or manner of accomplishment, is found in Section 2 of Title 18, United States Code, which reads as follows:
>
> "Whoever commits an offense against the United States, or aids, abets, counsels, induces or procures its commission, is punishable as a principal, and whoever willfully causes an act to be done which, if directly performed by him or another, would be an offense against the United States, is punishable as a principal." Properly construed, this statute means that not only the person who directly commits an act constituting an offense against the United States is guilty of the offense, but that any

person who aids, abets, counsels, commands, induces, causes or procures such person to commit such act is also guilty of such offense to the same degree and extent as the person who directly commits the act. (R. 1919-1920)

"... 'Cause' is a word of very broad import, and its meaning is generally known. It is used in this connection in its well-known sense of bringing about. One may cause the commission of a criminal act through an innocent agent, and still be responsible for it as a principal, or have others aware of its criminal nature or object aid and abet him in its commission, in which event all of the knowledgeable participants are equally responsible." (R. 1921)

"... Unless you find that the Government has established to your satisfaction beyond a reasonable doubt that a defendant committed the acts alleged in the indictment, or that he or she aided or abetted, whether in their commission, as that term has been explained to you, or that he or she willfully caused their commission by another as that term has been explained to you, you will find the defendant 'Not Guilty.'" (R. 1921-1922)

"... Whoever willfully causes an act to be done which, if directly performed by him or another would be an offense against the United States, is punishable as a principal." (R. 1924)

The indictment against petitioner shows on its face that the grand jury obtained its charges against petitioner from Title 18, United States Code, Section 2. This statute has an "(a)" part and a "(b)" part, and reads as follows:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> "(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

One of the questions herein presented is whether the word "causes" as contained in Title 18, United States Code, Section 2(b) is broader in its scope and meaning than the combined and specific methods of causation as specified in the (a) part, Title 18, Section 2. If the word causes is broader in scope, then it would appear that the judge had enlarged upon the indictment and thus amended it. Confronted with a similar problem in LePage v. United States, 146 F2d 536, 538, 539, 8 Cir. 1945,

the court in determining whether the word "cause" contained in one section of a federal criminal statute, included within its scope and meaning the word "induce," in another section of the same statute, said:

> "We think it is not our province thus to nullify a portion of an act, by statutory construction, when it is possible to reconcile the two sections giving each a separate meaning and effect and thereby preserve both sections of the act."

The Court and LePage held that the word "cause" was broader in its scope and meaning than the specific methods of causation set out in the other section. Petitioner contends that the same result should obtain in this court's construction of the two sections Title 18, United States Code, Section 2. However, if this court should construe the word "cause" to be no broader in scope and meaning than the specific methods of causation as set out in Title 18, United States Code, Section 2(a), then there is still another reason for holding that the trial judge enlarged on the charging part of the grand jury's

indictment when he instructed on willfully causes. This additional reason is that the indictment, in charging petitioner, left out one of the methods of causation as contained in Title 18, United States Code, Section 2(a). That is the grand jury declined to charge in the indictment that petitioner "commanded" the commission of the offense. Since the word "causes" would surely include within its scope and meaning the word "commanded," the trial judge, by his charge on willfully causes, in effect, put into the indictment a method of causation which the grand jury had intentionally left out.

The method of amending the grand jury's indictment in Stirone, supra, and Roach, supra, was the same as exists in petitioner's case; the method of enlarging on the charging part of an indictment by use of instructions to the jury. Although petitioner did not raise the error in the trial court, he did properly raise it in the Court of Appeals. The Roach case, supra, held that the act of the trial

judge in enlarging on the charging part of an indictment is such plain and fundamental error that the failure of the accused to object at the trial court level does not preclude the higher courts from noticing such error when the case is before them for review.

In failing to reverse petitioner's convictions, the Court of Appeals' opinion is directly in conflict with the holdings of this court in Ex Parte Bain, supra, and Stirone v. the United States, supra, as well as being in conflict with the opinions and pertinent holding of other Courts of Appeals as announced in United States v. Roach, supra, and in LeFage v. United States, supra.

REASON THREE

The holdings and opinions of the Supreme Court of The United States cited in this argument, as well as the holdings and opinions of other Courts of Appeals cited in this argument, are in direct conflict with the opinion of the Court of Appeals in

petitioner's case.

The argument herein is addressed to QUESTION FOUR AND QUESTION FIVE as raised in this petition for certiorari.

Petitioner contends that trial Court committed prejudicial error when it instructed the jury, over petitioner's objections, that the witnesses, Louis del Branton, Richard Hinton, William Badger and James Alford Boyd "...are accomplices of the defendants in this case...", after first having instructed the jury that "...an accomplice is one who voluntarily and with common intent participates with another person or persons in the commission of planning of a crime." Instructions, (R. 1913-1914). Objections, (R. 1936-1938).

This was prejudicial error of such a magnitude that it is plain error, requiring no objection from petitioner. Fortunately, however, there is not that problem here since appellant did timely object. The prejudice caused is obvious. It was an instruction

from the trial Judge that the named witnesses had participated in:

(a) the planning of a crime, and

(b) the commission of a crime, and that these named witnesses had participated in the commission of and planning of a crime with the defendants, Garner, Woods, Gurlesky, Villa-Franca and Frank Smith, this petitioner. Obviously this instruction invited the province of the jury, as it left the jury for the most part, with no question of guilt to deliberate upon. In fact, this instruction charged the jury with the duty of rendering a verdict of guilty as to all defendants on Counts I and IV, and guilty as to Gurleski on Count III. The fact that the jury found this petitioner not guilty of aiding and abetting the interstste transportation by Gurleski, of a stolen 1966 Volkswagen was obviously a matter of interpretation of the trial Judge's instructions, by the jury, that the Judge's instructions as to Count III of the indictment went only to Gurleski,

since he was the only defendant who was charged with the actual commission of the charged interstate transportation of the stolen 1966 Volkswagen and he was the only defendant in Count II connected to one of the named accomplices, James Alford Boyd, the only accomplice named in Count III. The jury could plainly see from the indictment that James Alford Boyd, one of the named accomplices, was charged with aiding and abetting Gurleski in Count III. The jury could also see that James Alford Boyd was not charged in Count III with aiding and abetting Garner, Woods, Villa-Franca and this petitioner, Frank Smith. Thus, the jury concluded that it did have one area left in the case as to the determination of guilt or innocence, that being whether Garner, Woods, Villa-Franca and this appellant, Frank Smith, were or were not guilty of aiding and abetting Gurleski in Count III. The jury could not escape the Court's instructions to find the defendants guilty as to Count IV because all of said defendants were charged in Count IV with aiding and abetting one of the named accomplices, Louis Del

Branton.

The Government may inquire as to why the jury asked twice for instructions on conspiracy if it considered the Court's instructions to bind them as above outlined. The answer is that the jury was trying to escape the Court's instructions to find all the defendants guilty on Count I, and was wanting to see if the planning of a crime, part of the Court's instruction on accomplices, fit into the definition of conspiracy. Obviously it does, and obviously, the jury reluctantly and finally concluded that planning a crime was akin to conspiring to commit a crime and that thus they must find all the defendants guilty as to conspiracy, as the Court had instructed them to do, by its erroneous and prejudicial instructions that the named witnesses "are accomplices of the defendant in this case." Further, neither this petitioner nor any other defendant had requested any instruction on accomplices.

Petitioner cites United States v. Balodimas,

C.A. 7th, 1949, 177 F2d 485; Holmgren v. United States, 54 L.ed 861, 271 U.S. 509, 30 S.Ct. 588; and United States v. Beadon, C.A. 2d 1931, 49 F2d 164, 169, certiorari denied 52 S.Ct. 11, 284 U.S. 625, 76 L.ed. 533; Fed. Rules Crim. Proc., rule 52 (b).

In Balodimas, supra, the trial Judge unequivocally named two witnesses as accomplices, gave the same precautionary accomplice instructions as did the trial Judge in the case at bar, and the 7th Circuit Court of Appeals reversed, even though no objection was raised in the trial Court. Balodimas held that such an instruction was so prejudicial that it was plain error, that it left nothing for the jury to do but find the defendants guilty, whereas the question of whether or not a witness is an accomplice is a question for the jury.

In Beadon, supra, the 2nd Circuit, held the trial Judge had not committed error when he gave a somewhat similar accomplice instruction, because he had made it a conditional instruction, that is, his

named witness would be an accomplice "if" the jury found that said witness was in a conspiracy with the defendants.

In Holmgren v. The United States, supra, 271 U.S. 509, this Supreme Court held that a question of whether or not a witness was an accomplice witness, is a question for the jury. In Count IV of the indictment, petitioner was charged with aiding and abetting the commission of a crime. It has been long settled that before the jury can find a defendant guilty as an aider and abetter, that the jury must first find that the offense or crime was actually committed by some person. The Judge's instructions declaring that the witnesses Hinton, Branton, Badger, and Boyd are accomplices of the defendants in this case instructed the jury that as a matter of law all four of these witnesses had committed a crime. In Count IV of the indictment, the witness Louis Del Branton, was the person charged with having committed the substantive Dyer Act crime charged therein. Having

instructed the jury that as a matter of law that Louis Del Branton had committed the offense alleged in Count IV, the jury was left with only one question, if any; that is, whether petitioner had aided and abetted in the commission of a crime. Since the jury was relieved of the duty of determining whether or not Louis Del Branton had committed a crime, petitioner was deprived of his right to a trial by jury.

REASON FOUR

The holdings and opinions of the Supreme Court of the United States cited in this argument, as well as the holdings and opinions of other Courts of Appeals cited in this argument, are in direct conflict with the opinion of the Court of Appeals affirming petitioner's convictions.

The argument herein is addressed to QUESTION SIX, SEVEN, EIGHT, and NINE in this petition for certiorrari.

The trial Court should have granted petitioner's

motion for mistrial after the Government's attorney stated in the presence of the jury, in effect, that the only purpose of asking the question as to the location of the secret numbers was to find out information by which petitioner could improve upon his car theft ring, should have admonished counsel, and should have instructed the jury to disregard.

When the Government raised the objection to petitioner being allowed to cross examine the witness, James Powers, as to the location of the secret and confidential vehicle identification numbers, it did so in a manner calculated to inflame the minds of the jurors and highly prejudice the jury against both petitioner and his attorney. The inflammatory and prejudicial statement of Government counsel is in part as follows:

> "...the confidential number which apparently is placed there to avoid just the kind of circumstances we are dealing with in this case. To disclose the location would seriously impair investigations of this kind and contribute substantially to success of operations like this in some future case." (R.1172).

This false, unwarranted, unnecessary and completely uninvited statement by Government counsel very clearly stated to the jury that the purpose of petitioner's inquiry as to the location of the secret numbers was not to solve any issue in the case and had no honest purpose but rather was a sinister attempt by petitioner and his attorney to find the location of these secret, confidential numbers so that petitioner could improve upon his alleged schemes of trafficking in stolen automobiles. It further, falsely indicated to the jury that petitioner's attorney was a party to and lent himself as a tool to such chicanery. From this moment forward and throughout the balance of the trial, the jury must have been looking not only at petitioner with inflamed emotions but at petitioner's attorney as well. For, according to what Government counsel had just told the jurors, appellant and his attorney were both part of a car-theft ring, they were both so brazen and bold in their attempts to perfect their operations

of an interstate car-theft ring that even while petitioner was on trial for conspiracy to transport stolen cars in interstate commerce, in the very sanctity of the Courtroom where he was being tried, before the Judge, the jury, the United States Attorney's first assistant, and F.B.I. Agent Chapman, that petitioner was busily attempting to improve the chances of success of his car theft ring so that in the future when a car was stolen by petitioner that he would know where that secret number is located and could do something about it, to avoid detection.

It is reasonable to assume that one or more members of the jury was inflamed and prejudiced against petitioner by this action on the part of Government counsel. And that such prejudice not only went against petitioner, but towards his attorney as well. For petitioner's attorney asked the question. If it had no bearing on any material issue in the case, as the Government stated and as the Court agreed by sustaining the objection, then the jury could only conclude that the purpose in asking the

question was as Mr. Harris had suggested, to improve on the schemes of trafficking in stolen automobiles in the future. Did petitioner have effective assistance of counsel as guaranteed him by the Constitution of the United States, 6th Amendment, after this point in the case? We think not. Appellant had but one attorney. And his effectiveness was not helped by Mr. Harris' statement to the jury. The jury heard the statement from Mr. Harris, heard the Court sustain the objection for the Government, heard the Court deny petitioner's motion for a mistrial, noted that the Court did not instruct them not to consider Harris' statement for any purpose, which the trial Judge had done on several occasions when petitioner's attorney was getting close to the boundaries of the rules even without request from the Government, and, finally, the jury must have thought by the Court's silence in not admonishing Assistant United States Attorney, Harris, for this action, that the Court was agreeing with Harris.

This is not by way of saying that the trial Judge meant to leave this impression with the jury. District Judge Jack Roberts is one of the finest Judges anywhere on the bench and he would never knowingly or consciously do such a thing. But despite the fact that the Judge did not intend to leave the impression that he was placing his stamp of approval on what Mr. Harris had said, his silence in not instructing the jury to disregard Harris' statement, and his failure to admonish Harris for his actions, in the face of having sustained Harris' objection and having denied petitioner's motion for mistrial, could only lead the jury to the inescapable conclusion that the Judge, too, thought petitioner and his attorney were committing the chicanery Harris had suggested right there before the awesome might of the United States District Court.

This conclusion is further supported in that the Judge, in sustaining Harris' objection, did so by these words:

"THE COURT: Objection sustained under these facts."

Of course, every lawyer in the Courtroom knew that the Judge was referring to the facts that were built up in the testimony of Powers prior to petitioner's attorney asking the location of the secret numbers. But the jury was not composed of one single lawyer. The jury, not being trained in the law, could have reasonably concluded and probably did conclude that the Judge, when he stated, "Objection sustained under these facts", was referring to what Harris had suggested was the dishonest motive of petitioner's attorney in asking the question, and was saying that the remarks Harris had made about petitioner's motive in asking the question were facts.

Even though petitioner did not request the trial Judge to instruct the jury to disregard the inflammatory and prejudicial statement of Harris, and even though petitioner did not request the trial Judge to admonish Mr. Harris for such improper action, petitioner had made a motion for mistrial and the attention of the

Court was thus called to the inflammatory and prejudicial nature of Mr. Harris' remarks, and, therefore, the Judge owed a duty to petitioner to, on his own, instruct the jury to disregard, and to admonish Mr. Harris in the presence of the jury. For a United States District Judge sits not just as an arbitrator or a figurehead, ruling only on what he is called upon to rule by the advocates in the pit. The awesome might bestowed upon a United States District Judge charges him with the duty and responsibility to see that the trials in his Courtroom are conducted within the rules and bounds of a just and fair prosecution, as well as defense. Under the facts as herein set out, the trial Court committed plain error in not instructing the jury to disregard the prejudicial and inflammatory remarks of Government counsel, not to consider them for any purpose, and in failing to admonish Government counsel in the presence of the jury for such unfair, and unprovoked tactics.

In support of these contentions, petitioner

cites the following cases for the following holdings:

1. A prosecutor's task is to fight with hard but not foul blows, Cross v. United States, 353 F2d 454, 122 U.S.App. D.C. 283, C.A.D.C. 1965.

2. In prosecution for using and conspiring to use the mails to defraud gullible individuals by collecting fees for enrolling them as heirs of mythical Baker Estate, prosecuting attorney's statement in address to jury that, if accused were acquitted, they would have letterheads printed stating that they had been acquitted and that all Baker heirs should now enroll, was prejudicial because of reference to possible future conduct. United States V. Sprengel, 103 F2d 876, C.C.A. Pa. 1939.

3. The Court should have interrupted Government attorney's argument without waiting for objection. Viereck v. United States, U.S.Dist. Col. 1943, 63 S.Ct. 561, 318 U.S. 236, 87 L.Ed. 734.

4. It was error for the Government attorney to argue to convict the defendant or he would be back on similar charges, but error was cured when the Court instructed the jury that Government counsel could not speculate on future conduct of the defendants and that the jury must determine whether defendant was guilty as charged for his past conduct. Langford v. United States, 178 F2d. 48, C.A.Col. 1950, certiorari denied 70 S.Ct. 669, 339 U.S. 938, 94 L.Ed. 1355.

5. Where the Government counsel had made unwarranted inferences or insinuations cal-

culated to prejudice the defendant, the Court's instructions to the jury to "dissolve your minds of that statement", were insufficient to remove the prejudice caused to defendant. Dunn v. United States, 307 F2d. 883, C.A.Ga. 1962.

6. There are times when no admonition or instruction of the Court can remove from the jury's mind the effect of improper conduct and remarks of counsel. United States v. Schwartz, 325 F2d. 355, C.A.Pa. 1963.

7. Improper remarks of Government counsel were error even though defense made no request for cautionary instructions. Stewart v. United States, 81 S.Ct. 941, 366 U.S.1, 6L.Ed2d 84 (U.S.Dist. Col. 1961).

8. The Court owes the duty to admonish an attorney for violating the rules of evidence or procedure out of zeal for his cause. United States v. Schneiderman, 106 F. Supp. 906, (D.C.Cal. 1952).

REASON FIVE

The holdings and opinions of the Supreme Court of the United States cited in this argument, as well as the holdings and opinions of other Courts of Appeals cited in this argument, are in direct conflict with the opinion of the Court of Appeals affirming petitioner's convictions.

The argument herein is addressed to QUESTIONS

THIRTY AND THIRTY-ONE as raised in this petition for certiorari.

The trial court should have granted petitioner's motions for severance under the circumstances that existed after the witness, Louis Del Branton, testified.

Appellant cites:

Schaffer v. United States, 221 F2d 17 (5th 1955); Barton v. United States 263 F2d 894, (5th 1959); Belvin v. United States, 273 F2d 583, (5th 1960); United States v. Echles, 352 F2d 892, (8th 1965); DeLuna v. United States, 308 F2d 140, (5th 1962); Fed. Rules Crim. Proc. Rule 14, 18 U.S.C.A.

As a result of being tried jointly with the defendants Garner, Woods, Villa-Franca, and Gurleski, petitioner was deprived of the right to call said defendants as witnesses in his behalf. Had petitioner been severed, he could have argued to the jury that he had nothing to hide, that he had taken the witness stand and told the truth to the jury.

The Court's failure to sever petitioner from the trials of the other defendants deprived him of control of the defense of his case to his prejudice. For instance, this petitioner would have never called Louis Del Branton to the witness stand. For Louis Del Branton was the person charged with having actually driven the stolen 1966 Pontiac in its interstate transportation. Hinton had testified to this fact when the Government was putting on its case. Petitioner knew that Branton had pleaded guilty to Count IV, and so petitioner knew that Louis Del Branton could not claim immunity from testifying and that he would testify that he had, in fact, transported a stolen 1966 Pontiac in interstate commerce as Count IV charged. The Government had not called Branton as a witness, and apparently because of part of his testimony, had its reasons not to. But the attorney for Garner and Woods did call Branton to the witness stand, proved up that Branton had pleaded guilty to Count IV of the indictment, a fact which

the jury had theretofore no knowledge of, that he had actually, in fact, driven a 1966 Pontiac on the trip to California and Nevada. This certainly tended to corroborate this one point of Hinton's testimony which had theretofore been in a state of confusion, in a state of severe impeachment, and without any substantial or credible force. Petitioner was severely prejudiced by this testimony since it tended to prove up an essential element of the crime charged in Count IV, that, in fact a 1966 Pontiac, a stolen one, had been transported in interstate commerce by Louis Del Branton. Further, it tended to prove up that at least some of the other defendants were involved in a conspiracy to do just what Hinton said they had done. This, too, helped to bolster the testimony of the weak reed, Richard Hinton, the Government was relying on. True, Branton testified that he had never seen Frank Smith before being arrested in May, 1967, long after the conspiracy alleged was over, and had only maybe possibly heard of him before that time as

an automobile dealer in and around Austin, Texas. But this could not cure the damage done to this petitioner as above outlined.

It further forced petitioner to take the witness stand, and put on witnesses in his behalf, and allowed the Government to bring out evidence from petitioner that it would have not ordinarily been able to do, his past felony convictions, his admissions of having had business dealings with James A. Boyd, and having known him, of having known Richard Hinton, as well as other evidence that may have helped the Government's case against this petitioner. It enabled the Government to put on rebuttal witnesses and add to their case against petitioner. Had petitioner been severed, then he would probably have rested and closed out the evidence when the Government rested. For it was not until after Louis Del Branton testified that Petitioner's attorney made the final decision for him to testify and put on any evidence in his behalf. This is obvious from the record which plainly shows

petitioner's attorney stumbling all over the place trying to find his witnesses to call them to the stand.

Even if petitioner had the right to rest and close his case exclusive of the other defendants, and thereby have had the Court instruct the jury not to consider anything as against appellant that Louis Del Branton might testify to, this would not have helped appellant because the jury simply would not have been able to have removed from their mind and knowledge the fact that Louis Del Branton had tended to corroborate Hinton's testimony that Branton did transport a stolen 1966 Pontiac in interstate commerce as Count IV said he did, and that at least some of the other defendants were involved in such a conspiracy as Hinton claimed and the indictment charged.

This argument is not to say that petitioner would not have decided to take the stand and put on evidence in his defense, thus reopening the Government case for rebuttal, even though Louis Del Branton

had not taken the witness stand. Petitioner might have decided to do so, anyway. But once Branton was called to the stand by Garner and Woods and gave his testimony, petitioner had no alternative but to take the stand, thus allowing the Government to show to the jury that he had twice before been convicted of felonies, allowing the Government to cross-examine him and put on additional evidence.

During the night after the Government rested its case, petitioner's attorney had learned from the attorney for Garner and Woods that said attorney intended to call Louis Del Branton to the witness stand and offer his testimony, when he put on his defensive case. Petitioner's attorney knew that this would be highly detrimental to his defense of petitioner, Smith, for the reasons heretofore stated and so, anticipated that he would have to put this appellant on the stand, if the Court did not grant severance. The motion for severance had as one of its grounds that petitioner would not be in control

of his defense and the defensive evidence, unless he was severed. Said motion was reurged and overruled just immediately prior to Louis Del Branton being called to the witness stand by the attorney for Garner and Woods (R. 1537-1538), which motion went to the benefit of all defendants as stated by the Court when he overruled same and, of course, was the Court's ground rule which was invoked at the outset of the proceedings against all the defendants. Petitioner again renewed his motion for severance after Louis Del Branton testified, which was overruled. (R. 1904-1905).

REASON SIX

The holdings and opinions of the Supreme Court of the United States cited in this argument, as well as the holdings and opinions of other Courts of Appeals cited in this argument, are in direct conflict with the opinion of the Court of Appeals affirming petitioner's convictions.

The argument herein is addressed to QUESTIONS

FOURTEEN AND FIFTEEN as raised in this petition for certiorari.

It was prejudicial error for the trial court to order appellant's attorney not to allude to or comment on the failure of any other defendant to testify in appellant's jury argument (R. 651-653), particularly when this order was made before the trial began.

Petitioner says that this was prejudicial to his defense whether or not his defense was antagonistic to that of any of the other non-testifying defendants. But, even though this be true, still, the attorney for non-testifying defendants, Charles Garner and Ellis Woods, repeatedly, in his cross-examination of the Government witness Boyd, drug this petitioner's name back into the testimony, causing said witness to repeat his previous testimony alleging guilty knowledge and criminal acts he attributed to petitioner, which set up antagonistic defenses, as obviously the attorney for Garner and

Woods was attempting to shift the spotlight and the blame to this petitioner. (R. 1474, 1476, 1478-1479) De Luna v. United States, (5th Circuit) 308 F. 2d 140, reh. den. 324 F. 2d 375; Hayes v. United States (1964, CA 8 Mo.), 329 F. 2d 209, certiorari denied 377 U.S. 980.

Since the attorney for Garner and Woods had attempted to shift the spotlight of guilt to this petitioner, petitioner's attorney owed the duty to his client to make the argument that petitioner had the courage to take the witness stand and tell the truth, that he had nothing to hide, and that perhaps Garner and Woods did have something to hide since they did not take the witness stand. Petitioner's attorney could not, under the Court's injunction as he understood it, even make the argument that petitioner had nothing to hide because he had the courage to and did take the witness stand, even without mentioning that Garner and Woods, Gurleski and Villa-Franca had not testified. For this certainly would

have been an allusion to the fact that the other defendants had not testified, and the Court in its instructions on this point to all attorneys used the phrase "allusion by."

Petitioner's attorney owed the duty to appellant to argue that this was a conspiracy case, that Hinton had testified that he had conspired with Garner, Woods, Gurlesky and Villa-Franca, as well as this petitioner; that Hinton's testimony, even though it might be true as to the other defendants, was not true as to petitioner, and that this was indicated by the fact that petitioner could afford to take the witness stand and testify on direct examination and cross-examination, but that since the other defendants had not testified that they could not afford to do so. Petitioner further says that this injunction by the Court denied him effective assistance of counsel as guaranteed him under the United States Constitution, Amendment 6, and further denied him his rights to be convicted only

under due process of law, as guaranteed him by the United States Constitution, Amendment 5.

REASON SEVEN

The holdings and opinions of the Supreme Court of the United States cited in this argument, as well as the holdings and opinions of other Courts of Appeals cited in this argument, are in direct conflict with the opinion of the Court of Appeals affirming petitioner's convictions.

The argument herein is addressed to QUESTIONS TWENTY AND TWENTY-ONE as raised in this petition for certiorari.

The trial court should have allowed petitioner to cross-examine the government witness James Powers as to the location of the secret, confidential vehicle identification numbers on the Pontiac automobiles, or he should have stricken this testimony.

The Government witness, James R. Powers, an F.B.I. Agent, testified in response to questions put to him by the Government on direct examination,

as to the existence of a secret, confidential vehicle identification number on a 1966 Bonneville Pontiac and a 1966 Catalina Pontiac automobile, which trial testimony indicates were driven either part or all the way from Austin, Texas, to Las Vegas, Nevada, by Louis Del Branton on or about November 3, 1966. Agent Powers testified on direct examination that this secret number which he read off of his notes assisted him in determining the true identity of said automobiles to be that of stolen cars (R. 1162, 1168). On cross-examination petitioner's attorney asked the witness Powers to tell where this secret number was located on the vehicle. The Government objected and the Court sustained its objections, refusing to allow petitioner to cross-examine the witness as to the exact or general location of said secret number. (R. 1170-1175).

Petitioner's attorney had, before asking the location of said number, elicited testimony from

Agent Powers that it had been his experience that after cars were wrecked, they were sometimes rebuilt and that parts of the automobiles might be interchanged. Had petitioner's attorney been allowed to find out the location of said secret number on the automobile, he would have made an effort to check the automobile in question, first of all, to see if it actually were located wherever Agent Powers might say it was, and second of all, to see if the portion of the car whereon the secret number was located had been interchanged or replaced.

By the Court's ruling appellant was left in the dark as to whether the number was located on the frame of the automobile or on some portion of the car as flimsy and as easily interchangeable or replaceable as a windshield wiper, a screw, a nut, a bolt, a glass headlight bulb, the glass in the headlight itself or a floor mat that is taken out of the car every time it is washed. If Agent Powers had disclosed the location of the secret number to

have been on one of these flimsy, easily and often interchangeable parts of an automobile, then petitioner could have argued that there was more than a reasonable possibility or probability that there may have been an interchange or replacement of the part with the secret number on it, and, therefore, although the windshield wiper, screw, nut, bolt, glass headlight bulb, the headlight glass or the floor mat that had the secret number on it might have originally been on some stolen car, that it could have easily gotten separated from that stolen car and been used as a replacement on the Pontiac that Agent Powers was testifying about, giving a totally false impression that Agent Powers was testifying about (he testified about secret numbers on both the Catalina Pontiac and the Bonneville Pontiac) was a stolen car, which was a crucial issue in both Counts I and IV of the indictment. Appellant does not think that a secret number would logically be placed on a

windshield wiper, screw, nut, bolt, glass headlight bulb, the headlight glass or on the floor mat, but petitioner tried to find out, and the Government and the Court prevented him from so doing. Every part of a car is subject to being replaced, either in part or in whole. It is a common thing to do so. Agent Powers testified that even parts of the frame, itself, are changed on occasion. If the secret number was located on the frame of the Pontiac Agent Powers was testifying about, the section of the frame that contained the location of the secret number may have been replaced from some other automobile that had been a solen automobile. We will never know because the Court and the Government prevented appellant from finding out the location of the secret number. Petitioner contends that a secret number should not be so secret that it deprives a citizen of these United States, on trial for his freedom, of his right to due process of

law and to justice. Petitioner should have been allowed to cross-examine on this point. Williamson v. United States, 272 F.2d 495 (5th 1960); Alford v. United States, 1931, 51 S. Ct. 218, 282 U.S. 687, 75 L. Ed. 629. And the Court should have granted petitioner's motion to strike Agent Powers' testimony since petitioner was not allowed to cross examine him on this point.

Petitioner made a motion to strike this testimony because he had not been allowed the right to full cross examination, but it was denied. The facts in this case are stronger in petitioner's favor of having been prejudiced by the Court's action than were the facts in Williamson v. United States, supra, which the Fifth Circuit Court of Appeals strictly limited itself to when it said there was no error in the Williamson case.

REASON EIGHT

The holdings and opinions of the Supreme Court of the United States cited in this argument

as well as the holdings and opinions of other Courts of Appeals cited in this argument, are in direct conflict with the opinion of the Court of Appeals affirming petitioner's convictions.

The argument herein is addressed to QUESTIONS TWENTY-TWO AND TWENTY-THREE as raised in this petition for certiorari.

The trial court committed prejudicial error when it admitted Government Exhibit 5, an insurance company claim file, into evidence en masse since this file contained a highly inflammatory, hearsay memorandum falsely accusing petitioner of other crimes, and the trial court should have granted petitioner's motion to remove it from the jury's consideration.

For the proceedings wherein said Exhibit 5 was offered into Evidence and objected to, see R. 868-876. The prejudicial memorandum, lying amongst the many papers contained in Government Exhibit 5, which was offered and received into

evidence, en masse, states as follows:

> "9-7-67
> "Mr. Robert Meigs F.B.I.
> "CH -1-5357
> "Came into office to check this file. Trying to break theft ring. Car bearing serial # on this file now located in St. Louis. Apparently chassis was used to rebuild another car. Case will come to trial in San Antonio, Texas, date unknown. Advised Migs Watson Hoover could testify to fact we paid claim and sold salvage to Frank Smith Auto Parts. We will be advised in advance."

Petitioner further offered objection to Exhibit 5 at (R. 1709) when the following motion was made just immediately prior to arguments to the jury:

> "... Defendant's move the Court to remove from the jury's consideration all evidence introduced by the Government under the admission of records, of business records, for the reason that same contained many memoranda, letters and other items of correspondence which the Government has failed to establish the materiality and competency of such records alleged to have been kept in the due course of business..."

The Court overruled this motion. (R. 1709)

This was an en mass introduction of business records. In re Schmeller v. United States, C.C.A. 6th 1964, 143 F.2d 544, the Court said, "The District Court should have examined and ruled upon each paper

separately, and should have excluded the hearsay and the other incompetent evidence."

The trial Court certainly should have examined and ruled upon each paper separately contained in Government's Exhibit 5, considering the fact that the deadly hearsay memorandum, above quoted, accused Frank Smith of being a member of a theft ring, under investigation by the F.B.I., and further stated that Smith would be tried in San Antonio, Texas, at some later date for some felony crime related to car-theft, which could only have been interpreted by the jury to mean that petitioner Smith had an indictment pending against him in San Antonio, Texas, for a felony crime separate and distinct from the case these jurors were then hearing in Austin, Texas, all of which did grievous damage to Frank Smith.

REASON NINE

The holdings and opinions of the Supreme Court of the United States cited in this argument,

as well as the holdings and opinions of other Courts of Appeals cited in this argument, are in direct conflict with the opinion of the Court of Appeals affirming petitioner's convictions.

The argument herein is addressed to QUESTIONS TWENTY-SIX AND TWENTY-SEVEN as raised in this petition for certiorari.

The trial court committed prejudicial error when it instructed the jury that "... if the jury believes the testimony of an accomplice to be true beyond a reasonable doubt, that testimony is sufficient to convict the defendants, even though it is not corroborated by any other evidence," after first having instructed the jury that "The witnesses, Hinton, Badger, Branton and Boyd, are accomplices of the defendants in this case...," and after defining accomplices as the Court did. (R. 1913-1914)

This was such plain error as should be able to be raised for the first time an appeal although

appellant contends that his objection concerning accomplices as contained on page 1914 of the record, went to this point as well.

This instruction stated to the jury that if it believed the testimony of any one of the named accomplices, either Branton, Badger, Hinton, or Boyd, that the particular accomplices' testimony, so believed, standing by itself, is sufficient, without any further corroboration, or any other evidence of any nature, to convict the defendants, each and every one of them. Insofar as this petitioner is concerned, this is certainly not true as to Branton's testimony, for Branton did not testify in any manner about Frank Smith, except that he had met him for the first time after the indictment was returned in this case; it is certainly not true as to Boyd's testimony; and it is certainly not true as to Badger's testimony. For standing by itself, the testimony of any one of these three named accomplices certainly would not be sufficient to

convict this petitioner. Hinton's testimony, standing by itself, would come the closest to fitting the bill, as between all four of them, but appellant has already argued the insufficiency of Hinton's testimony, and again asserts that Hinton's testimony is insufficient.

In Stoneking v. United States, 232 F2d 385, a prosecution for a bank robbery and conspiracy, a similarly couched instruction was given to the jury. In Stoneking the Court instructed the jury that if they believed the testimony of a certain government witness (whose testimony proved nothing but identity of the defendant) that the defendant would be guilty. The Circuit Court of Appeals in Stoneking, supra, said that this was not error but only in view of the corrective and explanatory instructions given by the Court immediately subsequent to the offending instructions. But there were no explanatory or corrective instructions given by the trial court to petitioner's jury,

either immediately or ever. This was plain error. Petitioner cites: Hewitt v. United States, 8th 1940, 110 F2d 1, 110; and Harnung v. District of Columbia, 254 U.S. 135, 137, 138, 41 S.Ct. 53, 65 L. Ed. 185.

REASON TEN

The holdings and opinions of the Supreme Court of the United States cited in this argument, as well as the holdings and opinions of other Courts of Appeals cited in this argument, are in direct conflict with the opinion of the Court of Appeals affirming petitioner's convictions.

The argument herein is addressed to QUESTIONS TEN, ELEVEN, TWELVE, AND THIRTEEN, as raised in this petition for certiorari.

The Court should not have refused to furnish the jury with a written copy of his full instructions as appellant requested after the Court had orally instructed the jury and after the second question from the jury. (R. 1934-1936, 1953, 1956).

The jury was obviously confused by the oral instructions on conspiracy, they having twice requested additional instructions thereon. Petitioner is convinced they were confused as well on other matters. A multiple defendant conspiracy and aiding and abetting case is an intricate maze, complex, confusing and highly technical, both as to facts, the rules of evidence and the law. This is true to seasoned attorneys with a library at hand, and possibly to some members of the judiciary as well. Certainly it was and still is confusing to the writer of this brief, with weeks of research and years of practice behind him. And just as certainly, it was to petitioner's jury (twelve laymen) who got their instructions by word of mouth, in a short dose, without a single piece of writing to refer to.

The only logical reason for reading the charge to the jury, which is a sound reason, is to emphasize to the jury that it is bound by the

judge's charge, and to guard against the possibility that the jurors might not read the charge if the judge simply handed it to them and told them to read it in the jury room. But once this precaution is taken, and the jury has heard the charge read, why should they be deprived of the printed guidelines of the law, word for word, comma for comma, in its exactitude. Why should they be deprived of that written exactness of the law by which they are theoretically bound, and without which no reasonable human being can be expected to remember, few will agree upon, and all will be forced to do just what the law says they must not do, to guess a man into the penitentiary. It thus seems beyond question to this writer than the jury should have a written copy of the charge in the jury room, to study, to refer to, to settle arguments with accuracy and finality between themselves as to what the judge read to them, and by which written guide they can sensibly, under the law,

apply the facts in order to reach a just and fair decision.

To do otherwise is to leave twelve laymen, individually or collectively, to interpret, to try to remember, and finally to throw up their hands in despair and take a majority vote on what they think they remember or understand that the judge said was the law.

The rule of oral submission of the charge is archaic, unfair, unjust, and should be done away with. The issue is squarely before this Court in this case, and now is the time to amputate. However, if this court does not see the problem in this light and leaves it to a matter of discretion with the trial judge, then we respectfully ask the Court to hold that the trial judge did abuse his discretion under this set of facts, and reverse the conviction on both counts.

The trial judge had two requests that the jury be given a written copy of his charge.

Petitioner made the motion for the entire charge to be submitted in writing immediately after the court had finished reading his charge to the jury. The jury specifically, in its second question to the judge, asked for the printed definition of conspiracy. The court replied to the jury's request for a printed definition of conspiracy by again reading to the jury a definition of conspiracy. Petitioner had objected to the court reading the definition when the jury's specific request was for a printed definition. In fact, Petitioner asked the court to respond by delivering his entire charge to the jury in writing. In Apel v. United States, 247 F.2d 277, 283, the Court said:

> "... the court, if it chooses to make reply, ordinarily has the right to answer the inquiry or grant the request within the specific limits of the jury question." (Emphasis ours)

REASON ELEVEN

The holdings and opinions of the Supreme Court of the United States cited in this

argument, as well as the holdings and opinions of other Courts of Appeals cited in this argument, are in direct conflict with the opinion of the Court of Appeals affirming petitioner's convictions.

The argument herein is addressed to QUESTIONS TWENTY-EIGHT AND TWENTY-NINE as raised in this petition for certiorari.

The trial court should not have arbitrarily, without any hearing, denied petitioner's motions for new trial based on newly discovered evidence that James Boyd had falsified when he denied any Government promises of leniency in return for his testimony...such falsity being then known to the Government prosecutors at the time, who chose to stand mute. Petitioner specifically requested this hearing in his motion.

Evidence of this is contained in petitioner's motion for new trial, (R. ), in his first supplemental motion for new trial (R. 555-558); in the affidavit of Mr. Will Knox, court

appointed attorney for the defendant, Dorothy Villa-Franca, as contained in petitioner's second supplemental motion for new trial, wherein Mr. Knox states under oath that his client was offered, by Mr. Jefferson, a probated sentence if she pleaded guilty (R. 592); the affidavit of Charles Garner (R. 497-498); James Alford Boyd's testimony during the trial (R. 1416-1448); the testimony of Richard Hinton during the trial (R. 976-977). And in the jury argument made by Government prosecutor, Andrew Jefferson, at appellant's trial praising Hinton and Boyd:

> "...I think they have each a legitimate right to expect to get some consideration, coming into this Court and taking the witness stand and telling the truth.... "... I think they have every right to expect consideration from this Court at the time they are sentenced, judging from their behavior in connection with this case." (R. 1844). See also: (R. 1845) for more of these accolades and good citizenship awards for Boyd and Hinton.

James Boyd testified at petitioner's trial that he had made no deals with the Government for

his testimony.

By affidavit dated the 16th day of October, 1967, defendant, Charles Garner, swore that after the trial and shortly after a disillusioned Boyd was sentenced to serve three years on his pleas of guilty in this case, that Boyd confessed to Garner that he had been expecting a probated sentence, and that Boyd was going to talk to the said Andrew Jefferson because Mr. Jefferson had promised to take care of him on probation, in return for his cooperation and testifying. (R. 497-498)

Mr. Jefferson has denied this. (R. 576-580)

Hinton finally admitted that the Government had offered him help in return for his testimony:

> Q: "...isn't this a fact--that you feel from the actions and representations and statements that have been made to you by members of the Federal Government, you feel that relief is going to be forthcoming?"

A: "I think they will help me, yes sir."

Petitioner seeks a hearing on the question; to be allowed to subpoenae witnesses, put on his proof and develop the record of that proof. Something as important as justice and due process of law should not be left in a questionable haze.

If it is not true then let us have our day in Court and slay the dragon once and for all. If it is true, then this petitioner should be released from the bonds of his conviction. Even if Boyd told no other lie than that he had not been led to believe that he would obtain a probated sentence or some other diminution of punishment, that is sufficient to reverse this petitioner's conviction if the Government attorneys knew he was lying when he said he had made no deals with the Government in return for his testimony. See Hawkins v. United States, 5th 1963, 324 F.2d 873. And see People v. Yamin, Sup. Ct. N.Y. 1965, 257 N. Y. S. 2d 11, for another excellent opinion and

treatment on the subject, stating that the Government attorney does not even have to know that the witness was lying, that if he should have known, if other officials of the Government had made such promises of leniency in return for testimony, then the case should be reversed. Petitioner also cites Everitt v. United States, C.C.A. 5, 1965, 353 F.2d 533, another case in point.

REASON TWELVE

The holdings and opinions of the Supreme Court of the United States cited in this argument, as well as the holdings and opinions of other Courts of Appeals cited in this argument, are in direct conflict with the opinion of the Court of Appeals affirming petitioner's convictions.

The argument herein is addressed to the question on prejudice resulting to the petitioner from the trial court's denial of his bill of particulars directed at the two 1966 Pontiacs referred to in Counts Two and Four of the

indictment.

The trial court erred in denying petitioner's motion for a bill of particulars as to the identity of the "1966 Pontiac" alleged to be transported in interstate commerce in both Counts II and IV of the indictment since the evidence shows by the testimony of the government witness, Richard Hinton, and the government argued to the jury that on or about November 3, 1966, Louis Dale Branton drove a stolen '66 Pontiac Catalina from the Western District of Texas to Phoenix, Arizona, then drove a stolen '66 Bonneville Pontiac from Phoenix, Arizona, to the State of Nevada, thereby prejudicing petitioner who was convicted of aiding and abetting the transportation of a stolen "1966 Pontiac" as charged in Count IV, from being able to successfully interpose a plea of double jeopardy, prior conviction or prior acquittal or any future prosecution that might be brought against him under Title 18, United States Code, Sections 2312 and 2, as to a November 3, 1966,

transportation of either a 1966 Pontiac [illegible] Pontiac Bonneville or a 1966 Pontiac Catalina. The trial court's denial of petitioner's motion for a bill of particulars came after the trial court had denied appellant's motion to dismiss the indictment which had as one of his grounds for dismissal, that Count IV was too indefinite, uncertain and vague to allow for pleas of former jeopardy, prior conviction or prior acquittal to any possible future prosecution on the same.

Petitioner here cites as authority the following cases and propositions of law:

1. The purpose of a Bill of Particulars is to advise defendant with sufficient particularity of matters necessary to enable him to prepare his defense. United States v. Casserino, 89 F. Supp. [illegible] (E.D.N.Y. 1960).

2. The courts have become more liberal in free trial discovery. United States v. Solomon, 26 R.F.D. 39[illegible].

3. The indictment must be clear enough to provide for an intelligent defense by the accused and to provide [illegible] plea of jeopardy. United States v. [illegible] Distributing Company, 148 F. Supp. [illegible].

4. The object of the indictment is, first to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the Court of the fact alleged so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law... United States v. Cruikshank, 92 U.S. 542, 23 L.Ed. 588, 593.

5. The remedy for the failure of an indictment to inform how, when, where and under what circumstances, was by Bill of Particulars. Frankfort Distilleries v United States, 144 F.2d 824, reversed 65 S. Ct. 661, 324 U.S. 293, 89 L.Ed. 961, certiorari denied Safeway Stores v. United States, 65 S. Ct. 121, 323 U.S. 768, 89 A. Ed. 615, and Kroeger Grocery and Baking Co. v. United States, 65 S. Ct. 188, 323 U. S. 777, 89 L. Ed. 621. Denial of due process, U. S. Constitution, Amendment 5 and 14; Fed. Rules Crim. Proc., Rule 7(f), 18 U.S.C.A.

Both Counts II and IV of the indictment charge the unlawful interstate transportation of a "1966 Pontiac," on or about the third day of November, 1966, without any further identification of the Pontiac so described. This petitioner is charged

with having aided and abetted the transportation of said "1966 Pontiac." In Petitioner's Motion for Bill of Particulars, he asked the Government to specifically identify the 1966 Pontiac charged in Count II and Count IV of the indictment, and further to specify whether said Pontiacs were the same car or different cars. The court denied Petitioner's Motion for Bill of Particulars.

REASON THIRTEEN

The holdings and opinions of the Supreme Court of the United States cited in this argument as well as the holdings and opinions of other Courts of Appeals cited in this argument, are in direct conflict with the opinion of the Court of Appeals affirming petitioner's convictions.

The argument herein is addressed to the points of error on unreasonable search and seizure as contained in the petition for certiorari of Michael Joseph Gruleski, as said errors relate to this petition.

To this end, this petitioner adopts and incorporates herein Michael Joseph Gruleski's petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Said petition for certiorari of Michael Joseph Gurleski is on file and now pending in the Supreme Court of the United States.

## CONCLUSION

Premises considered, petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, affirming his convictions, to the end that the judgment of said United States Court of Appeals and judgment of the Trial Court below be reversed, granting petitioner a new trial.

Respectfully submitted,

Robert Everett L. Looney
Attorney for Frank Smith
5405 Schumacher
Houston, Texas
Phone 621-5761

## CERTIFICATE OF SERVICE

I, Robert Everett L. Looney, attorney for Frank Smith, petitioner, for and in behalf of Frank Smith, do hereby certify that copies of this petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit have been sent first class, air mail, to the Solicitor General of the United States, Washington, D. C., and to Assistant United States Attorney Reese Harrison, Jr., Federal Building, San Antonio, Texas.

Robert Everett L. Looney

Appendix A

OPINION

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

---

No. 25339

---

MICHAEL JOSÉPH GURLESKI and
DOROTHY VILLAFRANCA,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

---

No. 25338

---

FRANK SMITH,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

---

*Appeals from the United States District Court for the Western District of Texas*

---

(November 27, 1968)

---

Before GOLDBERG and CLAYTON*, Circuit Judges, and NOEL, District Judge.

GOLDBERG, Circuit Judge: This is a consolidated appeal from convictions of the three appellants for conspiracy to violate the Dyer Act, 18 U.S.C. § 2312, and substantive violations of the same act. Count One of the indictment was a general conspiracy count under which the jury found all three appellants guilty. Count Three of the indictment charged Gurleski with transporting a stolen 1966 Volkswagen from Texas to California and charged Villafranca and Smith as aiders and abettors. Count Four charged another defendant, Branton, with transporting a stolen 1966 Pontiac from Texas to Nevada and charged Gurleski, Villafranca and Smith as aiders and abettors. The jury found Gurleski and Villafranca guilty under Counts Three and Four of the indictment and Smith guilty under Count Four but not guilty under Count Three. These appellants appeal their convictions under all counts.

Appellants Gurleski and Villafranca raise substantial constitutional questions with regard to certain searches and seizures and the admission of evidence therefrom. After careful review, we affirm for reasons that will appear below.

---

*Judge Clayton, the third judge constituting the court, participated in the hearing and the decision of this case. The present opinion is rendered by a quorum of the court pursuant to 28 U.S.C.A. § 46, Judge Clayton having taken no part in the final draft of this opinion.

## I.
## *THE SEARCH UNDER THE WARRANT*

The facts of the search conducted under the search warrant are undisputed. On March 23, 1967, Deputy Gary Simpson of the Travis County Sheriff's Department conducted a search of the premises at 904 St. Elmo Circle in Austin, Texas, pursuant to a validly executed state search warrant. The warrant specified as objects of the search certain enumerated items.[1] It is conceded that the state officer seized several items not specifically listed in the warrant (and none of the items that were listed). Appellant objects to the introduction of the items seized which were not described in the warrant, specifically Government Exhibits 57-64.[2] The government justifies the seizure and introduction of this evidence on either of two alternative grounds. The government contends first that the ob-

---

[1]The warrant authorized a search for the following: (1) a 16 mm projector, (2) a Wallensak tape recorder, (3) a record player, (4) a Viewlex filmstrip projector and (5) a combination Viewlex filmstrip projector with record player.

[2]These exhibits, all items seized during the execution of a search warrant, were: No. 57, a cigar box; No. 58, a piece of paper with an Austin telephone number on it; No. 59, printed material with two names and telephone numbers; No. 60, a postcard advertising master car key sets; No. 61, a personalized check book in the name of David Keup containing a green Minnesota registration card identifying a 1966 Pontiac car and a receipt issued to David Keup for said car; No. 62, a Stardust Hotel, Las Vegas, "receipt" made out in the name of Mike Gurleski; No. 63, a prior use registry from the Stardust Hotel also in the name of Mr. Gurleski and No. 64, a collection of instruments, including a Texas motor vehicle certificate of title. The government witness also described as coming out of the cigar box a set of silver-colored "pick-keys," a set of gold-colored keys and ignition switch tumblers.

jects in question were properly admitted because they were seized as "instrumentalities of crime" or "fruits of the crime" during the execution of a valid search warrant. An alternative ground relied on is the Supreme Court's abrogation of the "mere evidence" rule in *Warden, Maryland Penitentiary, v. Hayden,* 387 U.S. 294 (1967). Appellants, on the other hand, liken the search and seizure of these items to a general exploratory search for evidence such as that condemned in *United States v. Lefkowitz,* 285 U.S. 452 (1932). They answer the government's alternative argument by asserting that even if the Supreme Court has abolished the "mere evidence" rule in federal cases, search and seizure of "mere evidence" is still forbidden under Texas law. The principal question for determination remains the extent to which evidence seized during a search conducted under an admittedly valid search warrant is admissible if it is not described in the warrant.

The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures. A warrant must issue only upon probable cause and "particularly describing the place to be searched and the person or things to be seized". The Supreme Court early stated that "the requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States,* 275 U.S. 192, 196 (1927).

If this broad language were unwaveringly applied in every case, it is obvious that there could never be a valid seizure of anything not described in the search warrant. However, the *Marron* doctrine has generally not prevailed when the search and seizure was considered reasonable under all the circumstances. Many lower and intermediate federal courts, including those of this circuit, have regarded *Harris v. United States*, 331 U.S. 145 (1947), as formulating an exception to the strict language of *Marron*, thus permitting the introduction of the evidence seized in searches of the type involved in the case sub judice. In *Harris*, the defendant was convicted of unlawful possession, concealment and alteration of Selective Service documents. These documents were admitted into evidence over defendant's objection. The grounds for objection were that agents of the FBI had a warrant to arrest defendant for mail fraud violations and in the process of a search incident to that arrest discovered the incriminating Selective Service documents relating to an entirely different offense. The Supreme Court upheld the conviction and found that the objects discovered were properly subject to seizure. The language of the court which forms the principal basis for the many lower court opinions relying on *Harris* is as follows:

> In the present case the agents were in possession of facts indicating petitioner's probable guilt of the crime for which the warrants of arrest were issued. The search was not a general exploration but was specifically directed to the means and instrumentalities by which the crime charged had been committed . . .

> the agents conducted their search in good faith for the purpose of discovering the objects specified . . . . Nothing in the agents' conduct was inconsistent with their declared purpose.
> 331 U.S. 153, 154.

The reasoning of the *Harris* majority, while specifically related to searches incident to a lawful arrest, applies with equal force to a search made under authority of a valid search warrant. The Supreme Court in *Warden v. Hayden*, supra, impliedly considered all searches under lawful authority (either arrest warrant or search warrant) to be governed by the same limitations.[3] The search must be one directed in good faith toward the objects specified in the warrant or for other means and instrumentalities by which the crime charged had been committed. It must not be a general exploratory search through which the officers merely hope to discover evidence of wrongdoing. No suggestion has been made that this search was too thorough or too long in duration. Deputy Simpson was looking for

---

[3]Mr. Justice Brennan stated the issue under review in *Warden v. Hayden*:

> We review in this case the validity of the proposition that there is under the Fourth Amendment a "distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which the escape of the person arrested might be effected, and property the possession of which is a crime."
> 387 U.S. at 296.

the objects specified in the warrant. When he came upon evidence that indicated possible theft from or of automobiles, he could reasonably have seized the evidentiary matter in question as instrumentalities which might be connected with the theft of the objects specified in the warrant.

Our position is buttressed by the Supreme Court's decision in *Abel v. United States*, 362 U.S. 217 (1960), where the court upheld a search incident to an administrative arrest prior to deportation which resulted in the discovery of objects leading to a conviction for espionage. The agents were not specifically looking for such evidence, but they discovered it in the course of an orderly search under lawful authority. The court specifically found that the administrative search was not a subterfuge for a search directed toward uncovering evidence of espionage. Similarly, there was no covert attempt to unmask a car theft ring in the case at bar. There is no evidence that federal authorities had contacted state officials to ask them to make a pretended search for stolen goods. In this case, as in *Harris* and *Abel*, officers acting in good faith and under proper authority discovered evidence of more than one offense. There is no logical or constitutional reason, in the absence of any showing of unreasonableness, why the fruits of such a discovery should not be admissible evidence. The Supreme Court speaking through Mr. Justice Frankfurter spoke logically and directly to this issue when it said:

> When an article subject to lawful seizure properly comes into an officer's possession in the

> course of a lawful search it would be entirely without reason to say that he must return it because it was not one of the things it was his business to look for.
> *Abel v. United States*, supra, at 238.

The exception to the stringent *Marron* doctrine formulated in *Harris* and reiterated in *Abel* has been followed by the majority of lower federal tribunals.[4] In *Johnson v. United States*, 293 F.2d 539 (D.C. Cir. 1961), cert. den. 375 U.S. 888, officers had a search warrant for certain stolen articles, including a vacuum cleaner, clock radio and other valuables. In the course of searching for these things, an officer looking in a dresser drawer discovered a credit card issued in the name of the complaining witness. The introduction of the credit card into evidence was upheld by the court, relying on *Harris*. The court stated that an officer engaged in a lawful search is not confined to seizing only those items described in the warrant especially where the unlisted items seized are instrumentalities of a crime. In *United States v. Eisner*, 297 F.2d 595 (6 Cir. 1962), cert. den. 369 U.S. 859, the defendant was convicted of receiving and concealing stolen fur garments.

---

[4]In all candor, it must be admitted that some of the lower federal courts have adhered to the strict language of *Marron* and distinguished the *Harris* opinion on the ground that *Harris* was concerned only with the scope of a search incident to an arrest while the issue was the scope of a search under a search warrant. For example, see *United States v. Coots*, 196 F. Supp. 775 (E.D. Tenn. 1961); *United States v. Sorenson*, 202 F. Supp. 524 (E.D. N.Y. 1962), aff'd 330 F.2d 1018; *Woo Lai Chun v. United States*, 274 F.2d 708 (9 Cir. 1960); *United States ex rel Nickens v. LaVallee*, 391 F.2d 123 (2 Cir. 1968) (dicta); and from this circuit, *Cofer v. United States*, 37 F.2d 677 (5 Cir. 1930).

Agents had obtained a search warrant for certain furs which were not found in defendant's automobile. Other furs were in fact seized. The court in upholding this search and seizure again relied on the *Harris* rationale. They reasoned that the discovery of the other furs provided evidence that another crime had been committed which the officers could not ignore. The majority relied on the safeguards that surround the issuance of a search warrant to justify the seizure of nonspecified objects. "Probable cause to search the automobile existed, regardless of what the search developed," 297 F.2d at 597. This is a balanced statement of the law which demands that searches be reasonable, in good faith and not an unwarranted invasion of privacy.[5]

*Seymour v. United States*, 369 F.2d 825 (10 Cir. 1966), cert. den. 386 U.S. 987, is another example of where a seizure of items not specifically described in the search warrant was upheld. The court recognized the strong sanctions of the Fourth Amendment and also the strong language of the *Marron* opinion but said:

> . . . notwithstanding the specificity of the constitutional prohibition, the courts have appar-

---

[5]The case of *Kremen v. United States*, 353 U.S. 346 (1957), cited by appellant is an example of an unreasonable, bad faith search. There, agents removed the entire contents of a house and attempted to introduce every item in evidence. There was not even a pretense of a search directed toward specific objects. Rather there was a general exploratory search condemned by the decisions of every court in the United States. In contrast, the officers who investigated the home of Villafranca and Gurleski did not engage in any wholesale removal of evidence but seized only articles which they discovered incidentally during a limited search for objects described in a search warrant.

> ently recognized a narrow exception dictated by the practicalities of a particular situation as where in the course of a lawful search pursuant to a lawful arrest or the execution of a valid search warrant the officer uncovers evidence of another crime.
> 369 F.2d at 827.

Finally, this court has upheld the government's position on the admissibility of the evidence in question. In the leading case of *Bryant v. United States*, 252 F.2d 746 (5 Cir. 1958), officers were empowered to search only for heroin. Instead, they discovered and seized gelatin capsules and balloons and milk sugar, all possible ingredients of narcotics operations. Defendant objected to the introduction of these items into evidence on the ground that they were outside the scope of the search warrant. Nevertheless, this court found that the search and seizure of these possible instrumentalities of a crime was reasonable under the circumstances. In *Barnes v. United States*, 374 F.2d 126 (5 Cir. 1967), this court upheld another seizure of evidence not strictly within the scope of the warrant. This court stated:

> The search warrant was issued in accordance with Rule 41 (b) (2), F. R. Crim. P. which authorizes search warrants for property which has been used in the commission of criminal offenses. Since the postal money order stub and hammers fell into this category it was not necessary that they be specifically listed in the warrant.
> 374 F.2d at 128.

This search was limited in scope and duration. It was conducted under lawful authority obtained from an impartial magistrate. The objects seized, although not described in the warrant, had a reasonable relation to the purpose of the search. *Johnson v. United States*, supra; *United States v. Russo*, 250 F. Supp. 55, 58 (D.C. Pa. 1966). We have emphasized that the seized items could easily be classified as fruits and instrumentalities of a crime, but since *Warden v. Hayden*, supra, it is unnecessary for us to state unequivocally that the seized objects were in fact fruits and instrumentalities. A finding that the objects are reasonably related to the offense committed is all that is necessary under federal law. Appellants suggest that under Texas law, objects must still be definitively classed as fruits and instrumentalities of a crime before they are admissible. Our examination of the applicable Texas law, §§ 18.01, 18.02 and 18.19, Texas Code of Criminal Procedure, convinces us that the Texas statutes are no more demanding than the Fourth Amendment of the United States Constitution and Rule 41(b), Federal Rules of Criminal Procedure. These statutes would not prevent the use of "mere evidence" in Texas if the Constitution permits its use in federal courts. In the absence of Texas decision to the contrary, we conclude that Texas courts would follow *Warden v. Hayden* and admit relevant "mere evidence". We have carefully examined the authorities cited by appellants and other decisions as well, and we conclude that this search of March 23 was reasonable under all the circumstances and the evidence obtained was properly admitted.

## II.
## *THE SEARCHES CONDUCTED WITHOUT A WARRANT.*

### A.
### *The search of March 29, 1967.*

Deputy Simpson returned to the premises at 904 St. Elmo Circle in Austin on March 29, 1967, and while there searched a 1959 Mercury vehicle. The deputy sheriff testified without contradiction that Mrs. Villafranca gave both oral and written consent to a search of the premises and the executed written consent with Mrs. Villafranca's signature is Government's Exhibit 65. In addition, the record shows Mrs. Villafranca herself opened the trunk of the car. Gurleski objects to the introduction of evidence taken from the automobile, principally on the ground that Mrs. Villafranca could not authorize a search of his car no matter how voluntary her consent to that search.[6] He urges alternatively that even if she could consent to a search of the car, she could not consent to the search of the *trunk* of the car because the locked trunk was personal and private.

The principal issue for determination is thus whether Mrs. Villafranca, who was not the wife of Gurleski, could consent to a search of his automobile. At the outset, the government contends that counsel for Gur-

---

[6]The following items were taken from the trunk of the Car: (1) a small bucket or container, (2) a hand drill, (3) a rivet gun, (4) a screwdriver, (5) assorted rivets, (6) gloves, (7) a rag, (8) an awl, (9) a broken screwdriver and (10) various other small items such as hooks and rivets.

leski first brought this evidence to the attention of the jury and that he did not object to its admission. However, the record indicates that counsel made an oral motion to suppress and thus presented the trial court an opportunity to determine this issue. Such a motion is sufficient to preserve the issue for appellate review.[7]

The authorities are split on the issue of consent by one person to a search of another's belongings or residence. The invariable criterion for decision in these cases is whether the search and seizure was reasonable under the circumstances. Too numerous for citation, are the cases which reiterate that the Fourth Amendment prohibits only those searches and seizures which are unreasonable. The Supreme Court stated in *United States v. Rabinowitz*, 339 U.S. 56 (1950):

> What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are "unreasonable" searches . . . . The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case.
> 339 U.S. 56, 63.

The uncontradicted testimony of Deputy Sheriff Simpson indicates that the search of this car was reasonable beyond any doubt. Mrs. Villafranca gave her oral permission to the search of the car. The car was parked immediately in front of the joint residence

---

[7]*Waldron v. United States*, 219 F.2d 37, 41 (D.C. Cir. 1955).

of appellants Gurleski and Villafranca. The officers certainly believed the automobile was jointly owned as well because Mrs. Villafranca had possession of the keys which she used to help the searching officers by opening the trunk for them. The officers took the items described above which they eventually learned belonged to Gurleski.[a] There is no evidence of coercion; the search was not even conducted in conjunction with an arrest. With the record indicating purely voluntary oral and written consent, this search was clearly reasonable under all the circumstances.

Appellants contend, however, that reasonableness is not the appropriate standard in all cases. They rely on *Cofer v. United States*, 37 F.2d 677 (5 Cir. 1930), where this court held that a "wife was without authority to bind her absent husband by waiving a legal warrant, or consenting to an unauthorized search", 37 F.2d 677, 679. The Fifth Circuit has never repudiated this doctrine of not allowing a wife to waive her husband's constitutional rights. However there is no husband-wife relationship in the case at bar. Rather two unrelated persons were living together as man and mistress. We think that the *Cofer* doctrine should not be extended to situations beyond the close confidential marital relation it was designed to protect. Instances of "waiver" of a defendant's rights by another are not unusual. For example, in *United States v. Eldridge*, 302 F.2d 463 (4 Cir. 1962), the defendant loaned his car to a friend for the day. Police suspected that the

---

[a] Gurleski's counsel intimated that the items found in the trunk of the car actually belonged to the witness Hinton.

car might contain stolen firearms. They obtained the friend's consent to search the car. Ever cooperative, the friend voluntarily opened the trunk of the car, and officers found and seized two stolen Coast Guard radios. The court in upholding the search and admitting the evidence found that "lower federal courts have deemed searches reasonable if consented to by the person in lawful possession of the articles seized, or the premises on which they are found . . ." 302 F.2d at 465. The majority analyzed carefully the relationship between the defendant and the person authorizing the search of defendant's car. While agreeing that the bailee's right to possession was not very formal or durable, the court concluded that he possessed enough indicia of ownership and control to authorize the search. The court's analysis placed the onus of responsibility for the decisive search and seizure on the defendant himself.

> Still for the time being Nethercott was clothed with rightful possession and control and could do in respect to the automobile whatever was reasonable and not inconsistent with its entrustment to him. No restriction was imposed on him except to return with the car by a certain hour. Although the defendant knew of the presence of the stolen radios in the trunk, he apparently did not think it worthwhile to take the precaution of forbidding his bailee to open the trunk or permit anyone to look into it. *He reserved no exclusive right of privacy in respect to the trunk when he delivered the key . . . . Access to the trunk is a normal in-*

> *cident to the use of an automobile.* (Emphasis added.)
> 302 F. 2d 463, 466.

The last two sentences above are a clear refutation of appellant's alternative point that even presuming a valid consent, the trunk was a place of special privacy. It is clear that Mrs. Villafranca had an unrestricted right to operate the vehicle and had possession of the keys at all relevant times.

In *Teasley v. United States,* 292 F.2d 460 (9 Cir. 1961), incriminating evidence was found as a result of a search of the defendant's apartment authorized by a co-defendant who apparently shared the apartment. The court's analysis is instructive with regard to the facts in the instant case.

> The arresting officers did not force or break their way into appellant's apartment but entered the apartment with Skinner who had a key to appellant's apartment. Nothing in the record indicates that Skinner obtained the key unlawfully, nor that the arresting officers forced Skinner to admit them to appellant's apartment. Appellant's own testimony indicates that Skinner was his friend, and that Skinner spent much time in appellant's apartment . . . . There is other testimony that Skinner was or had been living with appellant . . . for some week or ten days prior to appellant's arrest.
> 292 F.2d 460, 464.

The facts of the instant case are similar to *Eldridge*, supra; *Teasley*, supra. In each case, the consenting party maintained unrestricted possession of the key to whatever was searched. Other factors considered significant in determining that a search with consent of a party other than the defendant was reasonable are: (1) voluntariness of the consent; (2) place of the search was the party's home also; (3) the premises were under the party's immediate and complete control; (4) the search did not extend to the defendant's "personal effects" and (5) there was nothing "unfair, unreasonable or oppressive" about the search and seizure. Cf. *Roberts v. United States*, 332 F.2d 892, 897 (8 Cir. 1964), cert. den. 380 U.S. 980. These factors are all present in the instant case, and we hold that the search was reasonable and the evidence admissible under all the circumstances. We subscribe to the view that "where two persons have equal rights to the use or occupation of premises, either may give consent to a search, and the evidence thus disclosed can be used against either". *United States v. Sferas*, 210 F.2d 69, 74 (7 Cir. 1954), cert. den. 347 U.S. 935.

B.

*The search of April 27, 1967.*

This search, also made without a warrant, took place immediately after the arrest of Mrs. Villafranca. State and federal officers arrested Mrs. Villafranca under a valid arrest warrant and, at her insistence, took her

by her home so that she might change clothes.[9] Mrs. Villafranca read the "*Miranda*-type" warnings from a card on the way to her home. The officers thought it necessary to search the home for weapons, instruments of the crime or possible means of escape. The search revealed certain items later introduced into evidence.[10]

Any objection which appellants could make to this search and seizure was waived by the failure of counsel to make a motion to suppress or to object to the evidence obtained when it was introduced at trial. The rule is too familiar to need citation that in the absence of bringing the error of illegally seized evidence to the attention of the trial court, the objection is waived unless there has been a fundamental miscarriage of justice. Admission of the articles seized in the search of the house would certainly not be fundamental error considering the overwhelming weight of testimony and evidence connecting these defendants with the crimes charged. Though it is unnecessary for us to decide the question, we are compelled to state that all of the evidence indicates that this search was a reasonable one incident to the arrest of Mrs. Villafranca. In addition,

---

[9]Mrs. Villafranca had been arrested at her place of employment and was dressed only in slacks and a blouse. She stated that she wished to change clothes so that she might look more presentable at whatever legal proceedings were to follow her arrest.

[10]The following evidence was introduced as exhibits for the government: (1) a little blue address book; (2) vials; (3) pliers; (4) clips; (5) screwdriver; (6) flashlight and batteries; (7) gloves; (8) stove bolts; (9) auto license fasteners and (10) wire-cutters.

Mrs. Villafranca gave voluntary unequivocal oral and written consent to this search.

## III.

## *OTHER POINTS RAISED BY MRS. VILLAFRANCA.*

Other than those discussed above, Mrs. Villafranca asserts only three alleged errors of the trial court peculiar to her. All are without merit. She complains first of the trial court's charge to the jury in that it failed to limit the jury's consideration of hearsay statements and admissions and acts of co-defendants to the conspiracy portion of the indictment. This contention has been decided adversely to appellant notably in the opinion of Judge Learned Hand in *United States v. Olweiss,* 138 F.2d 798 (2 Cir. 1944), cert. den. 321 U.S. 744. The court there held that the admission of such statements is not limited to the hearsay exception for conspiracies, "but is merely an incident of the general principle of agency that the acts of any agent, within the scope of his authority, are competent against his principal". 138 F.2d 798, 800.

Appellant Villafranca also urges that the trial court erred, in view of her record, in sentencing her to serve three-year terms on Counts One, Three and Four to run concurrently. It is elementary that sentencing is discretionary with the trial judge, and he did not abuse his discretion by fixing punishment within the statutory limits. We have no warrant for reversing because the defendant had small children and that this was her first conviction. Indeed, the trial judge could have given consecutive sentences on all the counts. *Gore v. Uni-*

*ted States*, 357 U.S. 386 (1958); *Pereira v. United States*, 347 U.S. 1 (1953).

Finally, Mrs. Villafranca complains that the evidence is insufficient to support the jury's verdict. She makes much of the failure of the prosecution to show a division of the proceeds of the stolen car operations. Appellant claims that the evidence shows only that $100 was paid to her to drive a car to the West Coast. While this may be true, it would be a strange law of conspiracy that required each conspirator to receive his rightful share of the "proceeds" before he could be found guilty. And, indeed, that is not the law. There is a sufficient amount of credible evidence, particularly in the testimony of Hinton, that a jury could reasonably find that Mrs. Villafranca was an integral part of the conspiracy and guilty of aiding and abetting the offenses charged.

## IV.

## *POINTS RAISED BY APPELLANT SMITH*

If appellant Smith is correct, his was surely one of the most error-filled trials in the annals of Anglo-American jurisprudence. In his two briefs, he assigns no less than fifty-two points of error. Some of them raise substantial questions which will be treated below. The rest are so totally frivolous and without merit that they will be dismissed without discussion.

A.

*Denial of the motion for severance*

Rule 14, Federal Rules of Criminal Procedure, provides for relief from prejudicial joinder at the discretion of the trial court. A denial of severance is reversible only upon a showing of abuse of that discretion. *Opper v. United States*, 348 U.S. 84 (1954).[11]

The cases cited by appellant lend no support to his argument for severance. The principal case relied on, *De Luna v. United States*, 308 F.2d 140 (5 Cir. 1962), reh. den. 324 F.2d 375, involved a situation where the interest of the co-defendants were severely conflicting. The court noted the noncooperation between attorneys for the co-defendants and the attempts by each defendant throughout the trial to shift culpability to the other. The evidence in the instant case is to the contrary in that counsel for all defendants cooperated fully in urging the same objections and incorporating or joining common motions, pleas and points of errors. No defendant attempted to implicate only the other defendants. Thus, the telling consideration of *De Luna* is not present in this case.

---

[11] Absent some abuse of discretion, to be demonstrated by a clear showing of prejudice and the consequent denial of a fair trial, the determination is not subject to reversal.

*Smith v. United States*, 385 F.2d 34, 37 (5 Cir. 1967). The nature of the trial court's discretion is discussed in depth in *Peterson v. United States*, 344 F.2d 419, 422 (5 Cir. 1965); *United States v. Kahaner*, 203 F. Supp. 78, 81-82 (S.D. N.Y. 1962), aff'd 317 F.2d 459, cert. den. 375 U.S. 836.

Decisions such as *Barton v. United States*, 263 F.2d 894 (5 Cir. 1959), and *Schaffer v. United States*, 221 F.2d 17 (5 Cir. 1955), are not persuasive. In each of those cases, a co-defendant had made a confession or statement which gravely implicated the defendant seeking severance while tending to exculpate the co-defendant. The courts quite properly believed that the admission of the statements in a joint trial would cast one party as the cooperative witness and picture the other as both unresponsive and guilty. No such situation exists here where efforts of defense counsel were highly coordinated. There was no abuse of discretion in denying severance to defendant Smith.

B.

*The alleged error in not allowing Smith's counsel to comment on the failure of the other defendants to testify.*

Prior to trial, the district judge ordered that defendants who took the stand would not be allowed to comment upon the ones who did not. Appellant contends that this order was prejudicial in that his defense was antagonistic to that of the other defendants and that the attorney for nonappealing defendants Woods and Garner was trying to shift the blame for their acts to Smith. Because of this, counsel argues that he "owed the duty" to employ the trial tactic of commenting on the failure of other defendants to testify.

This contention is very similar to the one raised as to severance. Again, appellant relies heavily on *De*

*Luna v. United States,* supra. The *De Luna* holding was:

> In a criminal trial in a federal court an accused has a constitutionally guaranteed right of silence free from prejudicial comments, even when they come only from a co-defendant's attorney. If an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, the trial judge's duty is to order that the defendants be tried separately.
> 308 F.2d 140, 141.

The *De Luna* rule applies only when it is counsel's *duty* to make a comment, and a mere desire to do so will not support an incursion on a defendant's carefully protected right to silence. Clearly, a duty arises only when the arguments of the co-defendants are antagonistic. As we pointed out in our discussion of the severance question, the defenses of Smith and his co-defendants were not antagonistic as that term is defined in *De Luna*. True antagonistic defenses are exemplified in *De Luna*. There, the party who testified claimed that he was an innocent victim of circumstances in that his cousin had tossed some narcotics to him right before an arrest was made and that he did not know that his cousin had been transporting narcotics. Counsel for the nefarious relative asserted that the defendants had been together for the whole caper. Thus, to demonstrate the innocence of Gomez, it was the *duty* of his counsel to comment on the failure of cousin De Luna

to contradict Gomez's version of the incident. In this case, on the other hand, counsel for appellant alludes to only one minute segment of the trial where he claims one defendant attempted to exculpate himself in this manner. This portion of the testimony does not have the effect counsel for Smith imputes to it. The record substantially indicates a highly coordinated defense by all the defendants and a united, spirited attack upon the credibility of witnesses Hinton and Boyd, neither a defendant in this case.

The Eighth Circuit has held on similar facts that there was no error in not allowing a comment on the failure of other defendants to testify. *Hayes v. United States*, 329 F.2d 209 (8 Cir. 1964), cert. den. 377 U.S. 980. In *Hayes*, the defendants were charged with embezzling union funds. None sought to escape criminal responsibility by blaming the others. The only testimony of the defendant in *Hayes*, like Smith at the trial below, was that he had committed no wrongful acts. The court held that where a defendant makes only a simple statement of his innocence, no benefit could inure to such defendant by allowing him to call the jury's attention to the fact that co-defendants did not testify. Any imaginable benefit would have to be weighed against the possible detriment to the other defendants. There has been no showing that the court's order hindered appellant's trial strategy. There has been no showing of possible prejudice remotely comparable to that in *De Luna*. Appellant's counsel has shown us no duty to bring the silence of other defendants to the jury's attention. The judge's order was not erroneous or prejudicial.

C.

*Alleged prejudicial comment by the government attorney with respect to the "secret" or "confidential" serial identification marks and the refusal of the trial court to allow cross-examination as to the location of these marks.*

The offending statement of the government attorney for which appellants sought to have a mistrial declared reads as follows:

> If Your Honor please, we object to this witness answering that question. We do not think that any issue before the Court at this time requires that this witness or any other witness to disclose the location, either exact or in the near vicinity of the confidential number which apparently is placed there to avoid just the kind of circumstances we are dealing with in this case. To disclose the location would seriously impair investigations of this kind and contribute substantially to success of operations like this in some future case.

Appellant's attorney moved for mistrial upon the issuance of these remarks, but significantly did not see fit to ask for a cautionary instruction. This could only be due to the fact that this was a brief, sober statement of why the government preferred not to divulge this evidence. There was no inflammatory language and no possibility that the statement was intended to create prejudice in the jury's mind. Despite appellant's long, flourishing argument to the contrary, these remarks of counsel for the United States must be con-

sidered extremely insignificant in the course of this long trial.

Appellant next insists that the trial court committed reversible error in not allowing him to cross-examine Agent Powers as to the location of these secret identification numbers. The gist of this contention is that the numbers might have been located on some easily removable part of the automobile and that someone might have tampered with the evidence or that the evidence might not be accurate. However, appellant laid no foundation for proceeding on such a theory, and location of the secret identifying numbers appears to be wholly irrelevant to any defense asserted by Smith. Just as the prosecution need not generally divulge the name of an informer unless some materiality is shown, they need not reveal the location of these marks, which are a highly valuable tool to law enforcement officers in discovering and solving car thefts. In addition, this court has already answered this question contrary to appellant's contention in *Williamson v. United States*, 272 F.2d 495 (5 Cir. 1959) cert. den. 362 U.S. 920. The trial judge's ruling did not deprive defendant of his right of cross-examination.

D.

*Denial of motion to keep Smith's previous criminal record from the jury.*

Defendant Smith had been convicted of car theft in 1949 and of being an accomplice to robbery by firearms in 1952. He obtained a full pardon from the State of Texas between those offenses and his trial for this of-

fense. He thus asserts that the pardon bars the introduction of evidence of these convictions for impeachment purposes. Logically, this is not a well-founded proposition. A pardon for any other reason than subsequent proof of innocence does not obliterate the defendant's previous transgressions particularly as they may bear on his present character and veracity. Any number of reasons may lie behind the granting of an executive pardon, but the granting of a pardon does not in itself indicate any defect in previous convictions. Neither does it negate any bearing that they may have on present credibility. Appellant introduced no evidence concerning the motives behind the granting of the pardon. In the absence of doubt being cast on the validity of these convictions, the pardon is not a bar. *Richards v. United States*, 192 F.2d 602 (D.C. Cir. 1951), cert. den. 342 U.S. 946.

Smith further argues that the convictions were too remote. The matter of remoteness is another matter within the sound discretion of the trial court. *Goddard v. United States*, 131 F.2d 220 (5 Cir. 1942). Here, while one conviction was eighteen years old, it nevertheless was for an offense identical to the one for which Smith was on trial. Thus, the trial court could have considered it relevant and not overly remote, and the trial court's determination should not be reversed on appeal.

E.

*The competency of witness Hinton and the possible perjury of witness Boyd.*

Appellant Smith reiterates throughout his brief on

appeal that he believes Richard Hinton was not a competent witness. He assigns as a specific point of error the trial court's failure to grant his motion to require the witness, Richard Hinton, to undergo a medical examination to determine competency. It is apparent that Hinton's testimony was often confusing and occasionally difficult to follow, but the record reveals no glaring inconsistencies or contradictions. The major discrepancy seems to be Hinton's testimony that Smith supplied identification for three of the stolen vehicles while at earlier grand jury proceedings and in an interview with FBI Agent Chapman, he had testified that only two of the essential papers came from Smith. This is a mere evidentiary matter surely having no great bearing on the guilt or innocence of Smith with respect to the offenses with which he was charged and convicted.

The general rule is that the determination of the competency of a witness is within the sound discretion of the trial court. *Carrado v. United States*, 210 F.2d 712 (D. C. Cir. 1953), cert. den. sub nom. *Atkins v. United States*, 347 U.S. 1018; *Manfredonia v. United States*, 374 U.S. 1020; *Smith v. United States*, 349 U.S. 932. The judge, at his discretion, may order a physical examination. Nothing in the holding of *United States v. Tannuzzo*, 174 F.2d 177 (2 Cir. 1949), cert. den. 338 U.S. 815, cited by appellant, requires that the trial judge do so. The only evidence relating to Hinton's credibility being his previous brief addiction to narcotics (aside from his involvement in the alleged offenses), the trial judge was correct in finding that Hinton was competent to testify. Use of narcotics affects only the weight

and credibility of testimony, not competency of the witness. *Brown v. United States*, 222 F.2d 293 (9 Cir. 1955). The jury was made well aware of Hinton's involvement with narcotics through the intense cross-examination of counsel. The jury chose to believe the witness, and their verdict should not be overturned on appeal.

The other principal government witness was James Boyd, and his testimony is assailed on the grounds that he committed perjury. The alleged perjury pertains to Boyd's assertion that the government did not specifically promise him anything in return for his testimony. Appellant attached various affidavits indicating perjured testimony by Boyd to his two motions for new trial. These affidavits were controverted by Mr. Jefferson, the government's attorney. The affidavits were conflicting as to what Mr. Boyd was promised, and the trial court resolved this conflict in favor of the government. Ordinarily, as in the instant case, the trial court may decide a motion for new trial upon affidavits without a hearing. *Lyles v. United States*, 272 F.2d 910 (5 Cir. 1959), cert. den. 356 U.S. 931.[12]

---

[12]Compare *Hawkins v. United States*, 324 F.2d 873 (5 Cir. 1963), with *Everitt v. United States*, 353 F.2d 532 (5 Cir. 1965). In the case sub judice, appellant significantly did not offer an affidavit from the witness Boyd concerning the alleged perjury. The challenge to Boyd's testimony is essentially another challenge to credibility which has already been weighed by the jury.

> The new evidence bore solely on the question of the credibility of the witness. Appellate courts are particularly cautious about reversing denials of motions for new trial on the ground of newly discovered evidence where such evidence relates solely to matters of credibility of witnesses against the accused.
> *Everitt v. United States*, 353 F.2d 532, 533.

F.

*The objection to the court's charge to the jury that "the witnesses, Hinton, Badger, Branton, and Boyd are accomplices of the defendants in this case".*

Appellant insists that the above instruction invaded the province of the jury and in effect instructed them to return a verdict of guilty. Standing alone, this statement might be prejudicial, but appellant has quoted it out of context. It is clear that the judge was instructing simply on the weight to be accorded and the close scrutinization to be given to accomplice testimony. The suggested criminal jury instructions by Judge La Buy in the Manual on Jury Instructions in Federal Cases, 33 F.R.D. 523, 577, are very similar.

Instructions must be considered in the overall context they are given. *United States v. Birnbaum,* 373 F.2d 250 (2 Cir. 1967), cert. den. 389 U.S. 837. In *Birnbaum,* Judge Kaufman discussed the function of appellate courts in evaluating a trial judge's instructions to the jury.

> In evaluating the instructions to the jury, not only must each statement made by the judge be examined in light of the entire charge, but the charge itself can only be viewed as part of the total trial. Often isolated statements taken from the charge, seemingly prejudicial on their face, are not so when considered in the context of the entire record of the trial.
> 373 F.2d 250, 257.

Measured by this standard, the trial judge's instructions were not prejudicial at all. Immediately before the "offending" statement, the judge had instructed the jury carefully that each defendant was presumed to be innocent until proved guilty beyond a reasonable doubt. Cf. *United States v. Beadon*, 49 F.2d 164, 169 (2 Cir. 1931), cert. den. 284 U.S. 625.

G.

*Sufficiency of the evidence.*

Appellant Smith finally argues that there is not sufficient credible evidence to sustain his conviction under Counts One and Four of the indictment. One of the reasons he assigns for this is a failure to positively identify him as the Frank Smith involved in the conspiracy. The basis for this is that one of the witnesses at the trial, Frank Smith, Jr., appellant's son, worked at the same location as appellant and could have been the Frank Smith mentioned in all the testimony. There is no merit to this contention, a rather flagrant breach of paternal loyalty. Positive identification of the defendant was made by both of the principal government witnesses. There is no showing that Frank Smith, Jr., was in the courtroom during these identifications or at any other crucial time. Further, all of the cases cited by appellant on the question of identification, whether affirming or reversing a conviction, stand only for the basic proposition that the question of sufficient identification of the defendant is for the jury. The jury, by its verdict, has decided that this particular Frank Smith was the person identified and that decision has ample support in the evidence. Cf. *Smith v. United*

*States*, 358 F.2d 695 (5 Cir. 1966), cert. den. 384 U. S. 942.

Smith also asserts that there is no showing that he had knowledge that the cars were stolen, that they were to be transported in interstate commerce or that the cars ever crossed the Texas border on their way to California and Nevada. There appears to be no direct evidence that Smith knew the cars were stolen, but there is ample evidence from which the jury could have inferred that he had such information. There would be little other use for the preparation and delivery of certificates of titles, plates and a full set of papers on wrecked cars if such documents and equipment were not to be used to facilitate sales of stolen automobiles, in the absence of any showing that there was an actual sale of the wrecked remains of the cars matching the papers. There is other evidence from which the jury could have inferred that Smith knew the cars were stolen such as his alleged phone call to the West Coast to warn the other conspirators. Moreover, Smith was not paid a unit price for the vehicle identification he provided but rather was to be paid half the selling price of the automobiles, a definitely unusual "business" arrangement. The phone call mentioned above provides evidence that he knew the cars had been transported across state lines to California. In any event, once it is shown that a defendant knew stolen cars were involved, the government need not show that he knew they moved in interstate commerce to support a Dyer Act or conspiracy conviction. *Donaldson v. United States*, 82 F.2d 680 (7 Cir. 1936); *Loftus v. United States*, 46 F.2d 841 (7 Cir. 1931). In summation, there is suf-

ficient credible evidence connecting Smith with the conspiracy that this court should not reverse the jury's verdict on appeal. The reviewing court should sustain the verdict of a jury "if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser v. United States*, 315 U.S. 60, 80 (1941).

As stated before, appellant Smith cites some fifty-two points of error, and the most significant of these have been discussed in this opinion and all of the others have been considered and are either frivolous or without enough merit to warrant any discussion. With regard to most of these alleged errors, we quote from the majority opinion in *Glasser v. United States*, supra, where the court stated:

> We must guard against the magnification on appeal of instances which were of little importance in their setting.
> 315 U.S. 60, 83.

Therefore, the convictions of appellants Gurleski, Villafranca and Smith are in all things

AFFIRMED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

---

October Term, 1967

No. 25338

---

D. C. Docket No. CR 67-28-A

FRANK SMITH,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
for the Western District of Texas.

Before GOLDBERG and CLAYTON*, Circuit Judges, and
NOEL, District Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District

Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

November 27, 1968

---

*Judge Clayton, the third judge constituting the court, participated in the hearing and the decision of this case. The present opinion is rendered by a quorum of the court pursuant to 28 U.S.C.A. § 46, Judge Clayton having taken no part in the final draft of this opinion.

Issued as Mandate:

APPENDIX C

OPINION ORDER

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

---

No. 25338

---

FRANK SMITH,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
for the Western District of Texas

---

(January 29, 1969)

---

ON PETITION FOR REHEARING EN BANC

Before GOLDBERG and CLAYTON*, Circuit Judges, and NOEL, District Judge.

PER CURIAM: Upon reconsideration of all briefs received by the court on behalf of appellant, Frank Smith, and a review of all briefs of Smith's appealing co-defendants, we are of the view that the case has been correctly decided.

The Petition for Rehearing is DENIED, and no member of this panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), the Petition for Rehearing En Banc is DENIED.

*Judge Clayton, the third judge constituting the court, did not participate in this decision to deny the petition for rehearing filed.